Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Petitioners,

v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Respondents.

On Petition for A Writ of Certiorari to The Court of Appeals of Texas for the Fifth District of Texas at Dallas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 12(2) of the Securities Act of 1933 is applicable to a privately negotiated resale of all the stock of a corporation.

2. Whether Section 12(2) of the Securities Act of 1933 entitles a purchaser to rescind a privately negotiated stock transfer agreement, and recover the full purchase price, even where the purchaser has liquidated the acquired corporation and there can be no restoration of the *status quo ante*.

3. Whether the anti-waiver provision of the Securities Act of 1933 prohibits parties to a stock transfer agreement from releasing existing but unknown claims arising under that Act.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Texas Court of Appeals are identified in the caption. Pursuant to Supreme Court Rule 29.1, petitioners state that all parent companies and subsidiaries (except wholly owned subsidiaries) of the corporate parties are as follows:

1. Petitioner Anheuser-Busch Companies, Inc. partially owns Budweiser Japan Company, Ltd. (through a wholly owned subsidiary) and St. Louis National Baseball Club, Inc.;

2. Petitioner Campbell Taggart, Inc., which is wholly owned by Petitioner Anheuser-Busch Companies, Inc., partially owns Europate S.A.

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IN THE

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OCTOBER TERM, 1994

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Petitioners,

v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

Campbell Taggart, Inc. and Anheuser-Busch Companies, Inc., petition for a writ of certiorari to review the judgment of the Texas Court of Appeals in this case, in which the Texas Supreme Court denied discretionary review.

OPINIONS BELOW

The orders of the Texas Supreme Court (Pet. App. A) are not reported. The opinion of the Texas Court of Appeals (Pet. App. B) is reported at 858 S.W.2d 928. The judgment of the 160th District Court of Texas, Dallas County (Pet. App. C) is not reported.

JURISDICTION

The judgment of the Texas Court of Appeals (Pet. App. A36-37) was entered on June 9, 1994. The order of the Texas Supreme Court denying discretionary review was entered on March 30, 1994, and the order overruling motions for rehearing was entered on June 2, 1994. Pet. App. A1-2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1988).

STATUTORY PROVISIONS INVOLVED

Section 12(2) of the Securities Act of 1933, 15 U.S.C. §77*l* (2) (1988), provides:

> Any person who ...(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such

security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 2(10) of the Securities Act of 1933, 15 U.S.C. §77b(10) (1988), provides:

> [U]nless the context otherwise requires - *** [t]he term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security, except that
>
> > (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of [Section 10]) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of [Section 10] at the time of such communication was sent or given to the person to whom the communication was made, and
> >
> > (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of [Section 10] may be obtained and, in addition, does no more than identify the security, state

> the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

Section 14 of the Securities Act of 1933, 15 U.S.C. §77n (1988), provides:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

STATEMENT

1. This case arises out of Petitioner Campbell Taggart Inc.'s sale of Herby's Foods, Inc., to Respondent Summit Coffee Company. (We hereafter refer to Petitioner Campbell Taggart as "Seller" and to Respondent Summit Coffee Company as "Buyer" or "Summit.") The sale was effected by a privately negotiated stock purchase agreement. Respondent Dunnam-Snyder Company, parent of Summit, guaranteed Summit's obligations under that agreement. Pet. App. A4-6.[1]

Herby's stock, the subject of this litigation, was never issued to the public; it exchanged hands only through the private sale of an on-going business. Campbell Taggart had

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[1] Petitioner Anheuser-Busch Companies, Inc., is the parent of Petitioner Campbell Taggart, Inc.

purchased Herby's in 1981 for investment purposes and ran the business until it was sold to Buyer. S.F.II at 128.[2] Buyer initiated the sale by approaching Seller in the spring of 1987 with an interest in buying Herby's, a business that made sandwiches for distribution to convenience stores. S.F. III at 113; IV at 251-54. After several discussions, the parties signed a letter of intent in August 1987, agreeing to the sale in principle. Exh. Ely 22;[3] S.F. II at 132, 137. Under the letter of intent, Buyer was entitled to inspect Herby's business records and premises, and it did so. Exh. Ely 22 at ¶ 10; S.F. III at 156-57; IV at 254-55; 269-71; VII at 920-21, 945.

After extensive negotiations, the parties closed the sale by signing the stock purchase agreement in October 1987. Under the agreement, the purchase price of Herby's was to be adjusted three months after the sale to take account of any liabilities that were outstanding but not disclosed at the time of sale, or any adjustments to the closing inventory. The three months between closing and price adjustment were intended to provide ample time for the parties to acquire all the information needed to make the adjustment. If the parties could agree to a price adjustment, either to raise or lower the price, they were to execute mutual releases in connection with that adjustment. Otherwise, each had the right to pursue its full legal remedies. Pet. App. A4-6. It is undisputed that Summit operated the company during the three-month adjustment period and had full control of Herby's and its books and records. Pet. App. A5; S.F. III at 96.

As the price adjustment date approached, the parties disagreed about the amount of the price adjustment but

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2 The Statement of Facts, which is the trial transcript, is cited as "S.F."

3 Exhibits retained their deposition designations at trial.

chose to settle the matter rather than litigate it. In February 1988, the parties signed a settlement and mutual release of "any and all causes of action of any nature whatsoever, at common law, statutory or otherwise," that any party has "or might have, known or unknown, now existing or that might hereafter directly or indirectly be attributable to . . . all past, present and future obligations" in connection with the price adjustment sections of the Agreement. Respondents Summit and Dunnam Snyder took $435,135.03 in consideration for their release of all claims. Pet. App. A6.

2. When Buyer failed to make certain payments under the stock purchase agreement, Seller sued Buyer in state court in 1988, to recover moneys owed. Buyer counterclaimed, alleging, among other things, that Seller had violated Section 12(2) of the 1933 Securities Act, by materially misrepresenting the extent of Herby's liabilities relating to outstanding insurance claims and the terms of a truck lease. Pet. App. A6.[4] Buyer also filed a separate suit in federal court, alleging that the same misrepresentations violated Section 10(b) of the 1934 Securities Act. *See Summit Coffee Co. et al. v. Campbell Taggart, Inc.*, No. C-910519R, (N.D. Tex. Mar. 31, 1991.)[5]

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[4] In dispute were 21 insurance (workers' compensation) claims, which, though not listed individually, were fully represented in the aggregate liability amounts disclosed before the sale. Nevertheless, Buyer has never paid a penny on these 21 claims; Anheuser-Busch assumed full responsibility for processing and payment of the claims. S.F. III at 163-64; VII at 943-44. As to the truck lease liabilities, the Seller claimed that it had been misled to believe that a weekly charge for rental of trucks was actually a monthly charge. For three months after the sale, however, Seller paid the correct weekly charges, week after week, before signing the release of claims. S.F. III at 181-82, 196.

[5] The suit was originally filed, virtually simultaneously with the state court action, in the Southern District of Texas, No. C-88-300,

The instant state court action was tried before a jury. At trial, it was undisputed that there was nothing left of Herby's but its paper stock. At the time of the sale, Herby's had 259 employees, a fleet of 99 trucks, and a customer base of 4700 convenience stores. S.F. III at 100-02. At the time of trial, Herby's had one employee, no trucks, and not a single customer. *Id*. The management team that the Buyer had established for Herby's placed the business in voluntary bankruptcy in September 1989 in order to sell all of the assets. S.F. III at 98-102. William Snyder, an officer and director of both Summit and Herby's, admitted unequivocally at trial that the Seller was not the cause of Herby's bankruptcy, and that all material events leading to Herby's demise occurred after the sale, when the buyers were in complete control. S.F. III at 120; *See also* S. F. III at 109-10; 134-36; 142; 146-47.

Although the jury found that the Seller had made material misrepresentations in the sale of Herby's, it also found that Summit had suffered $0.00 damages as a result of any misrepresentation, and that the Buyer could not restore the *status quo ante*.[6] Pet. App. A7. On these findings, the trial court awarded Summit rescission; specifically, the court ordered the Seller to refund the full purchase price of $5.5

Oct. 21, 1988, and then dismissed and refiled in the Northern District, where it is still pending. That case has been stayed pending final action in the instant proceeding. *See* Orders of October 20, 1992, and July 15, 1994.

[6] Dunnam Snyder, the parent company and guarantor, received no award under the securities laws. The court of appeals reversed the trial court's award of actual and punitive damages for negligent misrepresentation to Dunnam Snyder because the company had settled and released all claims. Pet. App. A28-29.

million, although Buyer could not return the company it bought. Pet. App. A22-23.[7]

3. Seller argued on appeal, *inter alia*, that the trial court erred because 1) section 12(2) of the 1933 Securities Act did not apply to the privately negotiated resale of Herby's; 2) in any event, rescission was unavailable given the jury's finding that the Buyer could not restore the *status quo ante*; and 3) Summit had released all of its claims, including those under the 1933 Securities Act.

The Texas Court of Appeals ruled that Section 12(2) of the 1933 Securities Act applied to the privately negotiated sale of Herby's. The state court generally agreed with the ruling of the Third Circuit in *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 687-93 (3d Cir.), *cert. denied*, 112 S. Ct. 79 (1991), which held that Section 12(2) applies only to initial offerings of securities, not to an after-market transaction, such as the sale of Herby's. Nevertheless, the court carved out an exception for the secondary sale by one owner of all the stock of a company.

As justification for its secondary-market exception, the court relied solely on two passages from the House Report of the 1933 Act. Pet. App. A25-26. In the first passage, the House Committee explained that the Act applied only to "new offerings" and not to "the ordinary redistribution" of securities, except where such redistribution "takes on the characteristics of a new offering." *Id*. at A25, *quoting* H.R. Rep. No. 85, 73rd Cong., 1st Sess. 5 (1933) (hereinafter H.R. Rep. No. 85).

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[7] The trial court denied Seller's Motion for Judgment and Motion for New Trial, which set forth its contentions regarding the 1933 Securities Act. *See* Pet. App. C.

In the second passage cited by the court, the House Report explained what such a "redistribution" would be. In explaining the term "underwriter," the Report describes a situation in which one or a select group of individuals who own all of the stock of a corporation decide "to dispose of their holdings and to make an offer of this stock to the public." H.R. Rep. No. 85 at 14. The lower court quoted a lengthy passage from the Report, but focused on the control being exercised and the information possessed by the seller. The court completely ignored, however, that this passage refers only to distributions and redistributions of stock **to the public.** *Id.* at 13-14. Based entirely on these passages, the court applied Section 12(2) to the **private** sale of Herby's in the secondary market. Pet. App. A26-27.

The state court of appeals further held that Summit was entitled to rescission of the private stock purchase agreement, despite the jury's finding that Buyer could not restore the *status quo ante*. In the court's view, the violation of Section 12(2) of the 1933 Act entitled Summit to a return of the full price it had paid for Herby's, even though the company had been a valuable asset at the time of sale, and even though Buyer, with no involvement by the Seller, had bankrupted and liquidated the company, leaving nothing but worthless stock to return to the Seller. Pet. App. A22-23.

Finally, although the parties had negotiated a release of all of the claims pressed by Buyer in this case, the court refused to permit release of the federal securities claims. The court held that, as a matter of law, based on the clear language of the release itself, the parties intended to release **all** of Buyer's existing claims -- known or unknown -- including those under the Securities Act. Pet. App. A11-12. Notwithstanding the parties' clearly-expressed intent, the Texas court held that the anti-waiver provision of the 1933 Securities Act, 15 U.S.C. 77n, precluded release not just of future claims but even of extant claims if they were

unknown to Buyer at the time of the release. Pet. App. A11-12.

4. Seller filed an Application for Writ of Error to the Supreme Court of Texas, raising its contentions regarding the 1933 Securities Act in Points of Error 1, 2, and 3. The state supreme court summarily denied the application, without explanatory remarks. Pet. App. A2. Seller's Motion for Rehearing addressed the same three issues under the Securities Act, but the supreme court summarily denied rehearing. Pet. App. A1.

REASONS FOR GRANTING THE PETITION

SUMMARY

The Court should grant this petition for the same reasons it granted review in *Gustafson v. Alloyd Co.*, No. 93-404, *cert. granted*, 114 S. Ct. 1215 (1994).[8] This case presents the identical issue regarding the applicability of section 12(2) of the 1933 Securities Act to a private sale of all of the stock of a company. A ruling in *Gustafson* that such a sale is not subject to the relaxed proof requirements and rescissory remedy of section 12(2) would be dispositive here. This

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[8] Summit sought rescission under both section 12(2) and its Texas counterpart, section 33(A)(2), Tex. Rev. Civ. Stat. Ann. art. 581-33A(2)(Vernon Supp. 1993). The Texas court of appeals interpreted the federal act; it made no independent analysis of the Texas securities statute, merely noting that it "should be applied in accordance with our interpretation of the federal statute." Pet. App. A27. *See also* Pet. App. A10-11; A22-23. Texas courts have routinely followed federal securities law in interpreting state law provisions. *See, e.g., Star Supply Co. v. Jones*, 665 S.W.2d 194, 196 (Tex. App. -- San Antonio 1984, no writ); *First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart*, 648 S.W.2d 410, 414 (Tex. App. -- Dallas 1983, writ ref'd n.r.e.).

case, in fact, presents even more compelling support for that ruling than *Gustafson* itself.

To apply section 12(2), with its automatic rescission remedy, to private transactions like the one here would produce two results that Congress never intended. Specifically, it would place an extraordinary fiduciary burden on private sellers and provide a windfall remedy to private buyers. Rescission here would mean that a sophisticated purchaser of all of the stock of a company, represented by counsel in a fully negotiated private sale, could take the company into quick financial ruin and then simply get all of its money back to start again. It would mean that a seller, having privately sold a company undisputedly worth $5.5 million, and having paid nearly half a million dollars to obtain settlement and release of all claims, could be forced to return the entire purchase price, without getting the company back. It would mean that any seller of a business would have to meet the fiduciary standards of a trustee, intended to be applicable only to securities transactions in which one party does not have access to the information necessary to a level playing field.

If section 12(2) is unavailable here, it does not mean that a defrauded purchaser has no remedy under the securities laws. As Summit has recognized by filing suit in federal court, section 10(b) of the 1934 Securities Exchange Act provides an appropriate remedy for a buyer in Summit's position. Congress addressed secondary-market stock sales in the 1934 Act, which affords a fully adequate federal remedy for stock misrepresentations without converting the seller of a business into a fiduciary of its buyer. To permit recovery under the 1933 Act as well would make nonsense of the statutory scheme and gut the 1934 Act's requirements of proof of scienter by the seller, reliance by the purchaser, and causation of damages.

There is no hint in the statutory language, structure, or legislative history of the 1933 Securities Act to suggest that Congress ever intended that Act to govern the private purchase of an incorporated business. To apply the 1933 Act to such private transactions would provide the purchaser of a company with an unjustified "ace in the hole." The lower court in this case, for example, ordered the seller to refund the full sales price of a company, even where:

- the purchaser took an on-going business, ran it into the ground and sold off all assets **but** the worthless stock, thus eliminating any possibility of restoring the seller to the *status quo ante*;

- the purchaser suffered no damages from the seller's misrepresentations, the bankruptcy indisputably had nothing to do with the seller, and the purchaser had full access to all company books and accounts while negotiating the final sales price of the business; and

- as they negotiated the final sales price, with full disclosure of company records, the parties settled all claims, including any claims under the federal securities laws, and the buyer received nearly half a million dollars for its release.

For the reasons discussed below, there is no justification in the statute or public policy for transforming the 1933 Act into an insurance policy for a party who fully negotiates the private purchase of a business.

1. The language, structure, and legislative history of the 1933 Act, as well as the overall scheme created by the 1933 and 1934 Acts, make clear that section 12(2) was

never intended to apply to aftermarket privately negotiated securities sales such as the one at issue here. Section 12(2), like most of the rest of the 1933 Act, was enacted to protect the investing public by remedying abuses in the process by which new issues of securities are distributed. Section 10(b) of the 1934 Act, by contrast, was designed to regulate aftermarket trading, including privately negotiated transactions like the one at issue. As this Court recently stated: "The 1933 Act regulates initial distributions of securities, and the 1934 Act for the most part regulates post-distribution trading." *Central Bank, N.A. v. First Interstate Bank N.A.*, 114 S.Ct. 1439, 1445 (1994).

Section 12(2), by its very terms, is limited in scope to initial public offerings. It applies only to a sale of a security "by means of a prospectus or oral communication." When Congress used this language, it was explicitly recognizing that only a particular type of sale is covered. If the section were meant to apply to all securities sales, there would have been no point to using this language at all. *See* Elliott J. Weiss, *The Courts Have it Right: Securities Act Section 12(2) Applies Only to Public Offerings*, 48 Bus. Law 1, 6-7 (1992) (hereinafter Weiss). As the Third Circuit explained in *Ballay v. Legg Mason Wood Walker, Inc.*, the term "prospectus" is used in the 1933 Act generally (and section 12(2) specifically) as a "term of art which describes the transmittal of information concerning the sale of a security in an initial distribution." 925 F.2d at 688. *See also First Union Discount Brokerage Services, Inc. v. Milos*, 997 F.2d 835, 843 (11th Cir. 1993); Robert A. Prentice *Section 12 (2): A Remedy for Wrongs in the Secondary Market?*, 55 Alb. L. Rev. 97, 125 (1990) (hereinafter Prentice). That court was correct that the term "prospectus" is consistently used in the statute to refer to initial distributions.[9] There is no warrant in the statute or

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[9] Although section 2(10), 15 U.S.C. § 77b(10), broadly defines "prospectus" in the context of initial offerings, there is no

legislative history for extending it beyond the offer of a public sale of securities.[10]

The term "oral communication" in section 12(2) must also refer to public offerings. It would be an absurd result to read the term more broadly than the term "prospectus". The phrase is properly limited by the canon of construction *noscitur a sociis* to oral communications made in connection with a public distribution. *Ballay*, 925 F.2d at 688. And again, to read the phrase "by means of a prospectus or oral communication . . ." to refer to all sales, rather than just public offerings, would be to strip it of any meaning. If Congress had intended to create a remedy that applied to all securities sales, it could simply have left out this crucial phrase. Weiss at 6-7.

Should there be any lingering ambiguity about the meaning of the term prospectus, the 1933 Act's legislative history repeatedly emphasizes that Congress was regulating public offerings, not privately negotiated sales, when it drafted section 12(2). While the Court has noted that

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justification for applying it to the entire universe of sales. The legislative history and structure of the 1933 Act reinforce that that definition should be limited to public offerings. In particular, the incorporation into this definition of the standards in sections 10 and 5, which deal exclusively with registration requirements in public offerings, clearly place it outside the realm of a private sale, which has no requirement of registration at all. In addition, section 2's "context" clause provides a statutory basis for limiting the term "prospectus" in section 12(2). *See* Weiss at 14-16.

[10] This reading of section 12(2) is supported by its location within the structure of the 1933 Act . It is a part of section 12, and directly follows section 11; both section 12(1) and 11 deal with violations of the registration requirements, which only apply to initial distributions. *See Ballay*, 925 F.2d at 691.

specific legislative history regarding section 12(2) is "sparse" *Randall v. Loftsgaarden*, 478 U.S. 647, 657 (1986), there is abundant legislative history demonstrating that the Act, as a whole, was designed to regulate only public offerings. *See* H.R. Rep. No. 85, at 5, 7, 9, 13-14. Indeed, James Landis, a principal drafter of the 1933 Act, has explained that the "patent concern" of the Bill's authors was "the flow of securities from the issuer through underwriters to the public rather than with the subsequent buying and selling of these securities by the public." James L. Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29, 36 (1959).[11]

This intent to reach only public offerings in the 1933 Act is so clear that Congress would have had to make any departure explicit. *See, e.g.*, Weiss at 18; Prentice at 123. Thus, the fact that the House Report does not expressly limit section 12(2) is "not neutral." Weiss at 18. Given the clear focus of the 1933 Act, there was no reason for the House Committee to discuss whether or not each particular provision was also aimed at regulating public offerings. *Id.*

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[11] One statement in the House Report concerning the scope of the 1933, for example, reads:

> In view of these exemptions [for certain securities and transactions] *and the restriction of the bill's application to new offerings*, the bill does not affect transactions beyond the need of public protection in order to prevent recurrences of demonstrated abuses.

H.R. Rep. No. 85, at 7 (emphasis added). President Roosevelt, in his message to Congress, described the concern of the proposed legislation culminating in the 1933 Act as "newly issued securities" and "every issue of new securities." "Regulation of Securities Issues," *Message from the President of the United States*, H.R. Doc. No. 12, 73d Cong., 1st Sess. 1 (1933).

Act, the House Report states: the "essential characteristic" of these civil liabilities "consists of the fact that all those responsible for statements upon the face of which the *public is solicited* . . . shall be held to standards like those imposed by law upon a fiduciary." H.R. Rep. No. 85, at 5 (emphasis added). Congress expressed no such intent for private business dealings.

The state court created a further anomaly. It generally agreed with the Third Circuit's holding in *Ballay* that section 12(2) does not apply to secondary transactions. Pet. App. A25-27. Nevertheless, relying entirely on two passages in the legislative history of the 1933 Act, the lower court held that the statute extends to after-market security sales that have "the characteristics of initial offerings due to the seller's control and access to information." Pet. App. A25-26 *citing* H.R. Rep. No. 85, at 5, 13-14. The court thus equated a sale of one hundred percent of the stock of a company with an "initial" offering, essentially because a seller possesses more information about the company than the buyer does. This analysis cannot stand.

First, the court's analysis simply ignores the nature of a privately negotiated sale where, as here, the full books and records of the company are opened to the potential buyer, who is in a position to demand any information it wishes. In such a setting, there is no information imbalance of power of the sort that Congress was concerned with in regulating initial offerings. If a buyer in the private setting

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Purchase Agreement at § 9.5(c). To extend section 12(2) to such a buyer in a privately negotiated transaction would constitute an extraordinary intrusion by the federal government into private business dealings and an entirely new fiduciary standard for all private sellers of businesses.

is in fact defrauded, it has the full remedies of the 1934 Act, as well as other fraud remedies.

Second, in reaching its peculiar result, the Texas court completely misread the two passages of legislative history upon which it relied. That history requires that for any "redistribution" of stock to be covered by section 12(2), the sale must include a public offering, the focus of the Act.[13] Beginning the general analysis of the Act's scope, the House Report notes that the Act does not affect "the ordinary redistribution of securities unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering." H.R. Rep. No. 85 at 5. "Distribution" is a term which is broadly understood to be a public sale of stock. *See e.g. Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 466 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959); *Cheltenham Bank v. Drexel Burnham Lambert, Inc.*, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94,391 (E.D.N.C. 1989).

The House Report makes clear that the "redistribution" referred to is also a public sale. The Report elaborated that where one or a small group of individuals own all stock in a company:

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[13] Although not cited by the Texas court, a minority of district courts, relying on the same legislative history passages as the Texas court, have also discussed a limited exception to the *Ballay* rule for secondary market transactions which take on the characteristics of new offerings. *See, e.g., Hedden v. Marinelli*, 796 F. Supp. 432, 435 (N.D. Cal. 1992); *Budget Rent A Car Sys., Inc. v. Hirsch*, 810 F. Supp. 1253, 1257-8 (S.D. Fla. 1992); *Fujisawa Pharmaceutical Co. v. Kapoor*, 814 F. Supp. 720, 729-30 (N.D. Ill. 1993). Like the lower court here, however, these cases also rely solely on the language of the House Report which makes clear that a public offering is required for a redistribution of stock to be covered by section 12(2).

> they may wish to dispose of their holdings and *to make an offer of this stock to the public*. Such a *public offering* may possess all the dangers attendant upon a new offering of securities. Whenever such a *redistribution* reaches significant proportions, the distributor would be in the position of controlling the issuer and thus able to furnish the information demanded by the bill. This being so, the distributor is treated as equivalent to the original issuer and, *if he seeks to dispose of the issue through a public offering*, he becomes subject to the act.

H.R. Rep. No. 85 at 13-14 (emphasis added), *cited* at Pet. App. A26.[14] The Report uses the terms "public offering" and "redistribution" interchangeably.

The parties expressly agreed that this sale was not a "distribution." Summit represented and warranted that it was acquiring the stock of Herby's solely for investment purposes and not for the purpose of distribution. Stock Purchase Agreement at § 9.5. In fact, Summit acknowledged that the stock it was purchasing would become restricted stock so as to preclude its public resale. *Id*.

It could not be clearer that for an aftermarket transaction to be covered, a public offering is required; the lower court simply ignored that fact. As recognized by one of the few courts even to discuss a potential exception to

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[14] The "redistribution" referred to in the House Report is thus explicitly aimed at the "underwriter" situation, in which all of the stock of a company is bought and then "redistributed" in a public offering. This has no application where the buyer purchases the stock for investment, not for distribution, as indisputably occurred here. *See* Stock Purchase Agreement at §9.5.

Ballay for redistributions which take on the characteristics of initial offerings, "[w]ithout a public offering, a transaction cannot qualify as an exception to the initial offering rule." *Hirsch*, 810 F. Supp. at 1257-58.

2. Intertwined with its basic error in applying the 1933 Securities Act to a private sale of stock, the lower court misinterpreted the Act in two other important respects.[15] First, the Texas court of appeals contravened well-settled law when it held that "restoration of the status quo ante is not a binding prerequisite to the remedy of rescission" under section 12(2). Pet. App. A22. A return of both parties to the *status quo* is a requirement for the remedy of rescission. 1 George E. Palmer, *Law of Restitution* § 3.11 at 294 (Little, Brown & Co. 1978); *Restatement (Second) of Contracts* § 384 (1) (1981)("a party will not be granted restitution unless . . . he returns or offers to return, conditional on restitution, any interest in property that he has received in exchange in substantially as good condition as when it was received by him . . . ").

Courts have not hesitated to apply this traditional requirement to the rescissory remedy of section 12(2). *See Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1035 (2d Cir. 1979) (rescission under section 12(2) means "an exchange meant to put the parties in a *status quo*."); *Johns Hopkins Univ. v. Hutton*, 297 F. Supp. 1165, 1226 (D. Md. 1968), (a security may be so changed that it would cause "rescission under section 12(2) to be unavailable"), *aff'd in part and rev'd in part on other grounds*, 422 F.2d 124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974), *Bridgen v. Scott*, 456 F. Supp. 1048, 1059 (S.D. Tex. 1978); *Gannett Co. v. Register Publishing Co.*, 428 F. Supp. 818, 827 (D. Conn. 1977)(the standards for determining whether an injured party is entitled to rescission under

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[15] Neither error would require correcting if the petitioners in *Gustafson* prevail.

section 12(2) "are essentially the same as the standards developed in common law fraud cases."). Indeed, nowhere in the text of the 1933 Act or its legislative history is there any indication that Congress intended to do away with the traditional rescissory requirement that both parties be returned to the *status quo*.

We do not quarrel with the proposition that a decline in the market value of a stock will not necessarily defeat rescission. *See Randall v. Loftsgaarden*, 478 U.S. at, 659.[16] Market decline on a passive investment, however, is not what happened here. Once Herby's was sold, Summit actively and unalterably transfigured and changed the company. Now there is nothing left of Herby's, and Summit cannot return the asset, or even any part of the asset it purchased. All that is left is worthless paper stock.[17]

The jury recognized this unarguable truth when it found that Summit could not return the *status quo* and

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[16] In reaching its conclusion that rescission was appropriate here, where Summit could not return the *status quo*, the Texas court of appeals erroneously applied *Randall v. Loftsgaarden*. The Court, in *Loftsgaarden*, was not presented with nor did it decide the question of whether both parties must be restored to the *status quo* in order for rescission to be appropriate. Instead, *Loftsgaarden* turned on the issue of whether tax benefits would be deemed "income" under the plain language of section 12(2). The Court held that they could not, explaining that "at common law, it is quite likely that tax benefits would be ignored for purposes of a rescissory remedy." *Id.* at 658. The same common law principles of rescission that the Court looked to in *Loftsgaarden* should also be applied in this case.

[17] Although to be entitled to rescission under section 12(2), the buyer must possess and have ability to tender the return of the securities, that is not the sole condition for rescission. Ability to tender the stock is merely a threshold requirement.

suffered $0.00 damages as a result of any misrepresentations. Nevertheless, Buyer here stands to collect a windfall of $5.5 million dollars, a full rescissory return of the purchase price of Herby's. Thus, applying section 12(2) to the instant transaction would do no more than provide Summit with an unjustified safety net of rescission now that it has become dissatisfied with its deal. This strange result is simply not what Congress had in mind when it enacted section 12(2).

The Texas Court of Appeals apparently believed that it was compelled to order rescission, notwithstanding the windfall that Buyer would receive, because otherwise the "sole remedy [under section 12(2)] would be unavailable." Pet. App. A23. While the court of appeals is correct that rescission is the only remedy provided under section 12(2), its concern for a wronged plaintiff is misplaced. Summit had, and actually pleaded, several theories of recovery, including statutory and common law fraud. Summit is also pursuing a potential federal remedy under section 10(b) of the 1934 Act. All of these causes of action would provide relief for actual damages suffered, and represent the appropriate avenues for relief in the aftermarket. Actual damages should be the measure in a case like this where the purchaser received a valuable company, but cannot return the company to the seller.

3. Finally, the Texas Court of Appeals created a new burden for establishing validity of a release under federal law. Specifically, it held that the mutual release here, for which Seller paid valuable consideration, did not apply to the securities claims, even though Buyer intended to release them. The court concluded that the anti-waiver provisions of the securities laws precluded release of not only future claims, but even those fully matured existing claims, if they were unknown to Buyer at the time of the release. Pet. App. A10-A14. The law is clear, however, that

the release is effective as to securities claims that existed at the time, whether or not Summit had actual knowledge of them. What the anti-waiver provisions prohibit is an agreement to waive or excuse **future** violations, which this release did not do. *Weinraub v. International Banknote Co.*, 422 F. Supp. 856 (S.D.N.Y. 1976).

The Ninth Circuit has held that where, as here, a release is the result of settlement negotiations between parties of equal bargaining power represented by counsel, it is indeed effective even as to **unknown** existing securities claims. *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1341-43 (9th Cir. 1992). The Ninth Circuit distinguished a unilateral relinquishment or waiver of rights, against which the anti-waiver provisions were meant to protect, from a release of all existing claims in exchange for valuable consideration, which evidences the parties' intent to end all of their various disputes and buy future peace.

The lower court failed to appreciate (Pet. App. A11) that the standard established by the Seventh Circuit also supports Seller's analysis. *See Goodman v. Epstein*. 582 F.2d 388 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979). The Seventh Circuit emphasized that the mere fact that one is faced with releasing another party from any possible liability "in connection with a transaction in securities," puts that individual on notice that he should undertake a "reasonable inquiry" to discover possible matured claims existing at the time of the release. 582 F.2d at, 404. That duty to inquire "insures that the signing of a waiver is something that will not be undertaken lightly," in the expectation that the anti-waiver provisions will justify acting with one's eyes closed. *Id.* at 404.

Because Buyer controlled and operated Herby's for three months before signing the release, it unquestionably had the means to know all of its claims before releasing them. Regardless of whether Summit had actually

discovered the securities claims before signing the release, in the words of *Goodman*, it certainly "**could** have" done so upon reasonable inquiry." 582 F.2d at 403 (emphasis added). The law is thus clear that Buyer's release of its other claims, was completely effective.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 1994

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APPENDIX A

THE SUPREME COURT OF TEXAS

P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 2, 1994

[LISTING OF COUNSEL OMITTED]

RE: Case No. D-4121
Style: ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC. v. SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled both motions for rehearing in the above referenced application/s for writ of error. Justice Enoch not sitting.

Sincerely,

John T. Adams, Clerk

by /S/
Blanca Morin, Deputy

THE SUPREME COURT OF TEXAS

P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 30, 1994

[LISTING OF COUNSEL OMITTED]

RE: Case No. D-4121
Style: ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC. v. SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied. Motion for extension to file brief is granted. Justice Enoch not sitting.

Sincerely,

John T. Adams, Clerk

by /S/
Blanca Morin, Deputy

APPENDIX B

AFFIRMED in part, REVERSED in part, MODIFIED, RENDERED in part, and REMANDED. Opinions filed June 9, 1993.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-92-00389-CV

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC., Appellants

v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY, Appellees

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On Appeal from the 160th District Court
Dallas County, Texas
Trial Court Cause No. 88-13482-H

OPINION

Before Justices Baker, Chapman, and Barber
Opinion By Justice Barber

This case involves disputes arising out of Campbell Taggart, Inc.'s sale of the stock of Herby's Foods, Inc. to Summit Coffee Company. Campbell Taggart and its parent, Anheuser-Busch Companies, Inc., sued Summit and its parent, The Dunnam-Snyder Company. Campbell Taggart and Anheuser-Busch sought damages for breach of obligations under a covenant not to compete and for monies expended by Anheuser-Busch to process and pay insurance claims against Herby's. Summit and Dunnam-Snyder asserted various counterclaims, including federal and state securities law violations, statutory and common law fraud, and negligent misrepresentation. The trial court rendered judgment in favor of Summit and Dunnam-Snyder, and Campbell Taggart and Anheuser-Busch appeal, asserting eighteen points of error. Summit and Dunnam-Snyder assert three cross-points of error. We reverse in part, affirm in part, render in part, modify, and remand for further proceedings.

SUMMARY OF FACTS

A. The Agreements

On October 26, 1987, Summit and Campbell Taggart entered into a stock purchase agreement by which Summit bought Herby's from Campbell Taggart for $5,500,000. The agreement provided for a purchase price adjustment three months after the sale, and it contemplated that the parties

would execute mutual releases in connection with the adjustment of the price on the adjustment closing date. If the parties could not agree on the adjusted price, they had the right to pursue their full legal remedies. The parties were to have full access to the books and records of Herby's prior to the adjustment. The agreement provided for either reductions or increases of the initial purchase price. The final adjusted purchase price was to be reduced by the amount of any undisclosed liabilities of Herby's, except that the purchase price would be reduced by truck lease liabilities only to the extent that those liabilities exceeded $600,000.

Also on October 26, 1987, Summit, Campbell Taggart, and Anheuser-Busch entered into a covenant not to compete. Campbell Taggart and Anheuser-Busch agreed not to compete against Herby's, and Summit agreed to cause Herby's to pay $500,000 to Campbell Taggart and Anheuser-Busch, payable in five annual installments of $100,000 each. The stock purchase agreement provided that Summit should cause Dunnam-Snyder to guarantee all of the obligations of Herby's and Summit contained in both the agreement not to compete and the purchase agreement.

Because of the large deductibles applicable to some insurance claims outstanding against Herby's, Summit and Dunnam-Snyder expressed some concern about the potential uninsured exposure. As a result of these reservations, the parties entered into a side letter agreement capping Summit's liability for each insurance claim at $100,000. Campbell Taggart agreed to pay all amounts in excess of $100,000 per claim. To handle post-closing processing of the insurance claims, the parties entered into a reimbursement agreement. The agreement provided that Anheuser-Busch would continue to advance the processing costs and that Summit and Dunnam-Snyder would

reimburse Anheuser-Busch for those expenses up to the agreed-upon $100,000 cap.

As the date for the final purchase price adjustment approached, the parties had disagreements about the amount of the price adjustment and representations concerning Herby's inventory. On February 1, 1988, Campbell Taggart, Summit, and Dunnam-Snyder entered into a compromise settlement agreement and mutual release regarding their disputes. Under the agreement, Campbell Taggart paid $435,135.03 to Summit and Dunnam-Snyder. All parties agreed to release each other "from any and all causes of action of any nature whatsoever, at common law, statutory or otherwise, . . . known or unknown," directly or indirectly attributable to the "above-recited disputes or controversies" and all past, present, and future obligations of Campbell Taggart in connection with sections 2, 3, and 8.4(c) of the stock purchase agreement.[1]

B. The Litigation

In 1988, Campbell Taggart and Anheuser-Busch sued Summit and Dunnam-Snyder to recover the remaining payments due under the covenant not to compete. Only the first installment of $100,000 had been paid. They also sought the expenses that Anheuser-Busch had paid for processing insurance claims to the extent that they were within the

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[1] Section 2, entitled "Adjustments of the Purchase Price," detailed the methods and the reasons for any reductions or increases of the initial purchase price of Herby's, including reductions for undisclosed liabilities. Section 3, entitled "Adjustment Period," specified that information would be provided by the seller to the buyer and that both parties would have access to Herby's books and records prior to the final adjustment. Section 8.4(c), which is not at issue in this case, contained representation by the seller about Herby's inventory.

$100,000 per claim cap.[2] Those expenses were stipulated to be $486,472.85.

Summit and Dunnam-Snyder counterclaimed, alleging that Campbell Taggart and Anheuser-Busch had misrepresented the extent of Herby's liabilities by failing to disclose some outstanding insurance claims and the terms of a Ryder truck lease. Summit and Dunnam-Snyder asserted claims of state and federal securities law violations, statutory and common law fraud, and negligent misrepresentation. It is undisputed that Campbell Taggart and Anheuser-Busch failed to disclose twenty-one insurance claims. There was conflicting evidence about the disclosures regarding the truck lease.

The jury made findings indicating that Campbell Taggart and Anheuser-Busch had violated state and federal securities law and had made material misrepresentations about Herby's liabilities. The jury found that Summit and Dunnam-Snyder had agreed to reimburse Anheuser-Busch for the insurance claim processing costs and had been unjustly enriched because of their failure to reimburse. However, the jury also found estoppel because Campbell Taggart and Anheuser-Busch had made material misrepresentations. The jury further found that Summit could not restore the status quo and that it suffered no damages as a result of the misrepresentations. The jury awarded actual and punitive damages to Dunnam-Snyder for negligent misrepresentation.

The trial court awarded rescission of the purchase price to Summit under the securities laws. The court also

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[2] As noted below, this lawsuit involves some undisclosed insurance claims against Herby's. However, Anheuser-Busch sought reimbursement expenses for only those claims that had been disclosed to Summit and Dunnam-Snyder.

awarded to Dunnam-Snyder actual and punitive damages for negligent misrepresentation as found by the jury. Summit was awarded attorney fees, and both Summit and Dunnam-Snyder were awarded pre- and postjudgment interest. The court denied any relief to Campbell Taggart and Anheuser-Busch.

RELEASE AGREEMENT

In their first point of error, Campbell Taggart and Anheuser-Busch contend that the trial court erred as a matter of law in rendering judgment for Summit and Dunnam-Snyder because their claims are barred by the release agreement. They argue that the release covers undisclosed liabilities like the ones at issue in this case. Summit and Dunnam-Snyder claim that the release is narrow and does not encompass the claims at issue. They also argue that the release is invalid under state and federal securities laws and that the defense of release was waived by failure to obtain jury findings on the issue.

A. Scope of Release

1. Applicable Law

A release that is valid on its face and has not been set aside is a complete bar to any later action based on matters covered by the release. *Deer Creek Ltd. v. North Am. Mortgage Co.*, 792 S.W.2d 198, 201 (Tex. App.--Dallas 1990, no writ); *DeLuca v. Munzel*, 3 S.W.2d 373, 375 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see Hart v. Traders & Gen. Ins. Co.*, 144 Tex. 146, 149, 189 S.W.2d 493, 494 (1945). In construing a release, as with other contracts, the primary effort is to ascertain and give effect to the intention of the parties to the release, considering the instrument as a whole.

Crawford v. Kelly Field Nat'l Bank, 733 S.W.2d 624, 627 (Tex. App.-- San Antonio 1987, no writ); *Johnson v. J.M. Huber Corp.*, 699 S.W.2d 879, 882 (Tex. App.--Amarillo 1985, writ ref'd n.r.e.); *Texas City Ref., Inc. v. Universal Oil Prods. Co.*, 681 S.W.2d 303, 305 (Tex. App.--Houston [14th Dist.] 1984, no writ); *Berry v. Guyer*, 482 S.W.2d 719, 720 (Tex. Civ. App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Mutual Fire & Auto Ins. Co. v. Green*, 235 S.W.2d 739, 742 (Tex. Civ. App.--Fort Worth 1950, no writ). When a release refers to a related document, the other document should be taken into consideration. *See Green*, 235 S.W.2d at 742.

General categorical release clauses must be narrowly construed. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 422 (Tex. 1984). Generally, a release covers only existing claims or claims being urged when the release was delivered. *Berry*, 482 S.W.2d at 720. A valid release may encompass unknown damages, results, or claims that may develop in the future. *Williams v. Glash*, 789 S.W.2d 261, 264-65 (Tex. 1990); *Quebe v. Gulf, C. & S. F. Ry.*, 98 Tex. 6, 13-14, 81 S.W. 20, 21-22 (1904); *Texas City Ref.*, 681 S.W.2d at 305; *White v. Grinfas*, 809 F.2d 1157, 1160 (5th Cir. 1987) (applying Texas law). Any claims not clearly within the subject matter of the release are not discharged, even if they existed when the release was executed. *Brady*, 811 S.W.2d at 938; *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 204 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.). The release must "mention" the claim to be released. *Brady*, 811 S.W.2d at 938.

2. Application of Law

We determine, based on the language of the release, that the parties intended the release to encompass the claims raised by Summit and Dunnam-Snyder. The release states that the parties had disagreements about the final adjusted

purchase price of Herby's, referring specifically to sections 2 and 3 of the stock purchase agreement. Section 2 provides that the adjusted purchase price shall be reduced to the extent of undisclosed liabilities. Section 2 even makes specific reference to liabilities regarding truck leases. Undisclosed liabilities, including undisclosed liabilities involving the terms of the Ryder truck lease, are at the heart of this lawsuit.

Thus, the purchase agreement contemplated the existence of undisclosed liabilities and provided for a purchase price reduction to the extent of such undisclosed liabilities. The release, in turn, specifically refers in the initial recitals to these sections of the purchase agreement and the disagreements regarding the adjusted purchase price. For the substantial consideration of over $435,000, and "in consideration of the [r]ecitals set forth above," Summit and Dunnam-Snyder released "any and all causes of action of any nature whatsoever, at common law, statutory or otherwise," which they "have or might have, known or unknown, now existing or that might hereafter directly or indirectly be attributable to . . . the above-recited disputes and controversies."

Although the release contains some broad language, when read as a whole it is specific about its scope. Even if we were to determine that the release contains some "general, categorical release clauses," by reading the release as a whole and using the language of the recitals to restrict the broader language which follows, we give the mandated narrow construction to such clauses. Having done so, we determine that the claims asserted by Summit and Dunnam-Snyder in this lawsuit, all of which involve undisclosed Herby's liabilities, are within the scope of the release. That the release does not specifically mention fraud or securities law claims is irrelevant. The release, by reference to the

stock purchase agreement, mentions *all* claims involving undisclosed liabilities, a specific class of claims that includes the claims at issue. Although perhaps unknown to Summit and Dunnam-Snyder when the release was executed, the record demonstrates that the claims, if valid, existed at that time. When parties specifically agree that they intend to release both "known and unknown" claims, we are required to honor and give effect to their agreement.

B. Validity of Release Under Securities Laws

1. Applicable Law

Both the federal and state securities statutes contain anti-waiver provisions. *See* 15 U.S.C.A. § 77n (West 1981); TEX. REV. CIV. STAT. ANN. art. 581-33(L) (Vernon Supp. 1993). The Texas provision is "essentially the same" as the federal provision. TEX. REV. CIV. STAT. ANN. art. 581-33 cmt. (Vernon Supp. 1993). The comment following the Texas statute states that the anti-waiver provision does not apply to, and therefore does not diminish the effectiveness of, a bona fide release or settlement of an existing claim, whether or not a suit has been filed. *Id.*

Despite the federal anti-waiver provisions, settlements or releases of claims involving violations of federal securities laws are not void as a matter of law, but the right to sue granted by those laws should be preserved against unintentional or involuntary waiver. *Murtagh v. University Computing Co.*, 490 F.2d 810, 816 (5th Cir.), *cert. denied*, 419 U.S. 835 (1974). A release of federal securities law claims is valid only as to mature, ripened claims of which the releasing party has actual knowledge or which the party could have discovered upon reasonably inquiry. *Goodman v. Epstein*, 582 F.2d 388, 402-04 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Doody v. E.F. Hutton & Co.*, 587 F. Supp. 829,

832 (D. Minn. 1984); *see American Gen. Ins. Co. v. Equitable Gen. Corp.*, 493 F. Supp. 721, 750-51 (E.D. Va. 1980). A release negotiated at arm's length and not the product of duress, fraud, or mutual mistake, which relates to matured claims of past federal securities law violations and does not excuse future violations, is valid and should be given its full legal effect. *Weinraub v. International Banknote Co.*, 422 F. Supp. 856, 858 (S.D.N.Y. 1976).

2. Application of Law

The federal cases applying the federal anti-waiver provision, particularly the *Goodman v. Epstein* opinion, are well reasoned and persuasive. Because the Texas provision is essentially the same as the comparable federal provision, we adopt and follow the reasoning and holdings in the above-cited federal cases in applying the Texas anti-waiver provision.

The record shows that the claims asserted by Summit and Dunnam-Snyder were mature and in existence at the time the parties executed the release. The next question is whether Summit or Dunnam-Snyder had actual knowledge at that time of the existence of the claims or whether the claims were subject to discovery upon reasonable inquiry. Despite some compelling evidence that Summit and Dunnam-Snyder either knew or should have known of the facts underlying their claims when they executed the release, the jury found that they did not have either actual or constructive knowledge until August 12, 1988, more than six months *after* the release was executed.

Campbell Taggart and Anheuser-Busch have not asserted on appeal that the jury finding is in any way erroneous. Therefore, the finding is binding on the parties and this Court and must be treated as conclusively

established. *See Crain v. Hill County*, 613 S.W.2d 367, 369 (Tex. Civ. App.--Waco 1981, writ ref'd n.r.e.); *Harvey v. Denton*, 601 S.W.2d 121, 125 (Tex. Civ. App.--Eastland 1980, writ ref'd n.r.e.); *Dallas Transit Co. v. Young*, 370 S.W.2d 6, 10 (Tex. Civ. App.--Dallas 1963, writ ref'd n.r.e.). Accordingly, because Campbell Taggart and Anheuser-Busch do not challenge the finding that Summit and Dunnam-Snyder had neither actual nor constructive knowledge of the facts giving rise to their securities law claims at the time the release was executed, the release is not effective to bar those claims.

C. Waiver of Release Defense

A question remains about whether the release is effective to bar Summit and Dunnam-Snyder's other claims, there being no statutory bar to its effectiveness regarding those other claims. Summit and Dunnam-Snyder contend that Campbell Taggart and Anheuser-Busch waived their defense based on the release because they failed to obtain any jury findings on the issue. We disagree.

1. Applicable Law

The trial court shall submit to the jury controlling questions raised by the pleadings and the evidence. TEX. R. CIV. P. 278; *see Martin v. United States Trust Co.*, 690 S.W.2d 300, 310 (Tex. App.--Dallas 1985, writ ref'd n.r.e.). On the other hand, when facts are undisputed or conclusively established, there is no need to submit the issue to the jury. *Sullivan v. Barnett*, 471 S.W.2d 39, 44 (Tex. 1971); *Martin*, 690 S.W.2d at 310. It is elementary that legal questions should not be submitted to the jury. *C & C Partners v. Sun Exploration & Prod. Co.*, 783 S.W.2d 707, 715 (Tex. App.--Dallas 1989, writ denied).

Construction of an unambiguous contract is a legal issue to be decided by the court. The jury resolves only *factual* disputes about the conduct of the contracting parties if such disputes remain after the trial court has determined the parties' respective obligations under the contract. *See ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 253 n.3 (Tex. App.--Dallas 1990, no writ); *see also S & D Group, Inc. v. Talamas*, 710 S.W.2d 680, 683 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.) (construction of unambiguous contract is question of law; jury may not be asked to construe legal effect of contract).

The question of whether a contract is ambiguous is a question of law. If a contract is so worded that a court may properly give it a certain or definite legal meaning, it is not ambiguous. A contract is ambiguous only when the application of pertinent rules of interpretation result in genuine uncertainty about which one of two or more meanings is the proper meaning. *C & C Partners*, 783 S.W.2d at 714.

2. Application of Law

No party pleaded that the release is ambiguous. The record indicates that all parties and the court treated construction of the release as a legal question. Our prior discussion of the scope of the release establishes that the release is unambiguous and that it encompasses the claims at issue in this case. Accordingly, there was nothing further to submit to the jury concerning the release, and Campbell Taggart and Anheuser-Busch did not waive their defenses based on the release.

Based on the foregoing, our holdings regarding the release are as follows. The release covers all of the claims asserted by Summit and Dunnam-Snyder. However,

because of the anti-waiver provisions in the state and federal securities laws, and because of the jury's uncontested finding that Summit and Dunnam-Snyder had neither actual nor constructive knowledge of the facts underlying their claims when the release was executed, the release does not bar the securities law claims. On the other hand, because there is no bar to the effectiveness of the release regarding the remainder of Summit and Dunnam-Snyder's claims, those claims are barred because they were contractually released. Accordingly, we sustain in part the first point of error.

MATERIALITY OF MISREPRESENTATIONS

In the second point of error, Campbell Taggart and Anheuser-Busch maintain that the evidence was either legally or factually insufficient to support the jury's findings that they made any statements or omissions that were material or misleading.

A. Standards of Review

In reviewing a no evidence point, we consider only the evidence and inferences that tend to support the challenged findings. All evidence and inferences to the contrary are disregarded. *Jacobs v. Danny Darby Real Estate, Inc.*, 750 S.W.2d 174, 175 (Tex. 1988). We uphold the jury's findings if there is more than a scintilla of probative evidence to support them. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 795 n.3 (Tex. 1991). Evidence that creates a mere surmise or suspicion of the existence of a fact is no more than a scintilla and has no legal effect. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

In reviewing a factual insufficiency point, we consider and weigh all of the evidence. The jury findings

must be upheld unless the evidence is so weak or the findings are so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. *Levinge Corp. v. Ledezma*, 752 S.W.2d 641,643 (Tex. App.-- Houston [1st Dist.] 1988, no writ). The jury weighs the evidence and determines the credibility of the witnesses. We do not substitute our judgment for that of the jury, even if a different answer could have been reached on the evidence. *Clancy v. Zale Corp.*, 705 S.W.2d 820, 826 (Tex. App.-- Dallas 1986, writ ref'd n.r.e.).

B. Applicable Law

An omission or misrepresentation is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding to invest. Stated another way, there must be a substantial likelihood that proper disclosure would have been viewed by the reasonable investor as significantly altering the total mix of information made available. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); Bridwell v. State, 804 S.W.2d 900, 903-04 (Tex. Crim. App. 1991). An investor is not required to prove that he would have acted differently but for the omission or misrepresentation. *TSC Indus.*, 426 U.S. at 449.

C. Sufficiency Review

1. Legal Sufficiency

One of the alleged misrepresentations was Campbell Taggart's representation that the Herby's Ryder truck lease had a fixed *monthly* charge of $87.13 per truck. However, the actual charge was $87.13 *weekly*. It is obvious that this misrepresentation substantially understated the cost of the truck lease. There was evidence that Summit and Dunnam-

Snyder made profit projections regarding Herby's using the erroneous figures supplied by Campbell Taggart and that the actual expenses wiped out the projected profits for the first two years after acquisition.

It was undisputed that Campbell Taggart failed to disclose twenty-one insurance claims outstanding against Herby's. The importance of pending insurance claims is demonstrated by the fact that Summit and Dunnam-Snyder raised concerns about potential exposure due to *disclosed* claims and their associated high deductibles. This concern led to a side agreement at closing which capped Summit's liability on the disclosed claims. The amount ultimately paid on the undisclosed claims approached $600,000.[3] William Snyder, president and director of Summit, testified that Summit would not have purchased Herby's if full disclosure about the truck lease and the insurance claims had been made.

There was ample evidence that the omissions and misrepresentations were material in the sense that the correct information would have been important to a reasonable investor and buyer. The no evidence contention has no merit.

2. Factual Sufficiency

Campbell Taggart and Anheuser-Busch argue that the evidence of material misrepresentations was insufficient because the parties contemplated in their purchase agreement the possibility of undisclosed Herby's liabilities, and they provided for that contingency. The purchase

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[3] Campbell Taggart and Anheuser-Busch eventually paid all of the undisclosed claims. However, we view this fact as irrelevant to whether their failure to disclose was material.

agreement provided that Campbell Taggart would indemnify Summit for any losses over $200,000 suffered because of any inaccurate representations. According to Campbell Taggart and Anheuser-Busch, Summit and Dunnam-Snyder cannot claim to have been materially misled because they received a limitation on their losses and they acknowledged that the failure of Herby's had nothing to do with the misrepresentations.

This argument misses the point, which is whether there is a substantial likelihood that the omissions and misrepresentations would have been important to the decision-making process of a reasonable investor and buyer. The jury was presented with substantial evidence that the undisclosed and incorrect information was indeed important to the buying decision. Furthermore, the jury might well have determined that the $200,000 for which there was no indemnification could have been an important factor in the buying decision. Nothing in the purchase agreement states that the indemnity was to be the sole remedy. Although they did not have to prove it to establish materiality, Summit and Dunnam-Snyder provided evidence that Herby's would not have been purchased had full and correct disclosure been made. Thus, even if the misrepresented facts had nothing to do with why Herby's ultimately failed, the fact remains that *no* losses would have been suffered if Summit had not bought Herby's.

The evidence was factually sufficient to support the jury's findings that there were material omissions and misrepresentations. We overrule the second point of error.

ADMISSION OF DEPOSITION TESTIMONY

In their third point of error, Campbell Taggart and Anheuser-Busch contend that the trial court erred in

admitting the deposition testimony of a witness, George Willis, because he was not identified in discovery responses as a person with knowledge of relevant facts.

A. Pertinent Facts

The record shows that George Willis worked for Chuckwagon Foods, a company owned by Summit and Dunnam-Snyder. Upon Summit's acquisition of Herby's, Chuckwagon was to be merged with Herby's. After Summit bought Herby's, Willis became part of Herby's management. Prior to the acquisition of Herby's, Willis accompanied William Snyder and others on a trip for the purpose of visiting Herby's operations and talking to Herby's personnel.

At trial, Campbell Taggart and Anheuser-Busch called Tommy Jeffrey, a Herby's employee prior to the acquisition, as a witness. Jeffrey testified that he told Willis that the Ryder truck lease cost was about $87 per week. In response, Summit and Dunnam-Snyder called Willis as a witness by deposition. Willis denied that Jeffrey had told him about the truck lease charge, saying that he had no knowledge of the terms of the lease prior to the acquisition.

B. Applicable Law

A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter unless the trial court finds good cause for admission of the evidence. The party offering the evidence bears the burden of establishing good cause, and good cause must be shown in the record. TEX. R. CIV. P. 215(5).

Rule 215(5) is intended to require complete discovery responses in order to promote settlement and prevent trial by ambush. The sole sanction, exclusion of evidence, is automatic unless there is good cause to excuse its imposition. The good cause exception permits a trial court, exercising its discretion, to excuse a failure to comply in difficult or impossible circumstances. *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992) (op. on motion for reh'g). The erroneous admission of evidence when good cause is not shown is subject to a harmless error analysis. *See id.* at 917; *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989).

Error is reversible only when it amounts to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause rendition of an improper judgment. Tex. R. App. P. 81(b)(1). The determination of whether the error was harmful is made in light of the record as a whole. *McKinney v. National Union Fire Ins. Co.*, 772 S.W.2d 72, 75 (Tex. 1989) (op. on reh'g). Erroneous admission of evidence is harmless if the evidence is cumulative or not controlling on a material issue dispositive of the case. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 230 (Tex. 1990); *Gee*, 765 S.W.2d at 396. If the judgment is not controlled by the testimony that should have been excluded, there is no reversible error. *Mancorp*, 802 S.W.2d at 230. Ordinarily, improper admission of evidence does not constitute reversible error if other evidence supports the finding in question. *Gee*, 765 S.W.2d at 397.

C. Application of Law

When Campbell Taggart and Anheuser-Busch objected to testimony from Willis, the trial court heard

argument of counsel on the issue.[4] Although Summit and Dunnam-Snyder provided arguably good reasons why they did not consider Willis as a witness to be called at trial, those reasons do not really address the failure to list him as a person with knowledge of relevant facts. We will assume, without deciding, that the trial court erred in allowing Willis to testify.

The next question is whether the admission of Willis's testimony was harmful error. Campbell Taggart and Anheuser-Busch emphasize the fact that his testimony was the only testimony directly contradicting Jeffrey's testimony that Willis was told of the correct truck lease cost prior to the sale of Herby's. However, there was other evidence that Summit and Dunnam-Snyder were misinformed about the cost of the Ryder truck lease. The three people who were responsible for negotiating the purchase agreement for Summit and Dunnam-Snyder were all given incorrect information. At the pertinent time, Willis worked for Chuckwagon, and it was not clearly established that he was an agent of either Summit or Dunnam-Snyder. Thus, even if the jury had been convinced that Willis became aware of the correct truck lease charge, such knowledge might not have been attributable to Summit or Dunnam-Snyder or those who made the decision to purchase Herby's.[5]

There was also undisputed evidence of the failure to disclose twenty-one insurance claims pending against Herby's. Willis's testimony had nothing to do with these omissions. Snyder testified that Herby's would not have been bought had these claims been disclosed. Thus, the jury

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[4] In disposing of this point of error, we do not decide whether argument of counsel alone is sufficient to support an implied finding of good cause.

[5] The jury was instructed on corporate knowledge.

could have based its findings on the undisclosed insurance claims alone. Based on the record, even assuming it was error to allow Willis to testify, we hold that the admission of Willis's testimony was not harmful or reversible error. We overrule the third point of error.

AVAILABILITY OF RESCISSION

In the fourth point of error, Campbell Taggart and Anheuser-Busch contend that the trial court erred as a matter of law in disregarding the jury's finding that the parties could not be restored to the status quo ante and in awarding rescissionary damages to Summit.

A. Applicable Law

The federal statute states that the buyer "may sue either at law or in equity . . . to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." 15 U.S.C.A. § 77*l* (West 1981). Our state statute provides that the purchaser "may sue either at law or in equity for rescission, or for damages if the buyer no longer owns the security." TEX. REV. CIV. STAT. ANN. art. 581-33(A)(2) (Vernon Supp. 1993).

Regarding the federal securities law, rescission is generally an exchange meant to return the parties to a status quo, and can only take place if the purchaser returns the stock he received. The plaintiff is given no choice of remedy. If he owns the stock, he is entitled to rescission but not damages. If he no longer owns the stock, he is entitled to damages but not rescission. *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1035 (2d Cir. 1979). The statute prescribes the remedy of rescission except where the defrauded buyer no

longer owns the security, in which case he is entitled to a rescissory measure of damages. *Randall v. Loftsgaarden*, 478 U.S. 647, 655-56 (1986).

"[B]y enabling the victims of . . . fraud to demand rescission upon tender of the security, Congress shifted the risk of an intervening decline in the value of the security to defendants, whether or not that decline was actually caused by the fraud." *Id.* at 659. The plaintiff buyer is entitled to rescission whether or not the misrepresentations caused the bankruptcy of the business invested in. *Casella v. Webb*, 883 F.2d 805, 808-09 (9th Cir. 1989).

Because the state and federal statutes contain virtually the same wording, decisions of federal courts applying the federal law are reliable guides to application of the comparable state provisions. *First Mun. Leasing Corp. v. Blankenship, Potts, Aikrnan, Hagin & Stewart*, 648 S.W.2d 410, 414 (Tex. App.--Dallas 1983, writ ref'd n.r.e.). Texas courts look to federal court decisions because of the obvious similarities between the state and federal statutes. *Star Supply Co. v. Jones*, 665 S.W.2d 194, 196 (Tex. App.--San Antonio 1984, no writ).

B. Application of Law

Our reading of the controlling federal cases indicates that restoration of the status quo ante is not a binding prerequisite to the remedy of rescission. The United States Supreme Court has expressed the opinion that restoration of the status quo is only *one* goal sought to be served by the remedy of rescission. Moreover, the Court indicated that the concern is with restoration of the *plaintiff's* position, not necessarily the defendant's. *Randall v. Loftsgaarden*, 478 U.S. at 659. Thus, the federal statute shifts risk of any decline in the security's value to the defendant. Moreover, a federal

court has indicated that rescission is appropriate in a case, like this one, where the business invested in became bankrupt, a situation where the status quo ante obviously no longer prevails. *See Casella v. Webb*, 883 F.2d at 808-09.

Also, the federal courts have held that rescission is the exclusive remedy when the plaintiff still owns the stock. If an inability to restore the status quo barred rescission, the sole remedy would be unavailable. We do not believe that either Congress or the Texas Legislature intended such a result.

We determine that the Texas provision should be applied in accordance with the federal provision.[6] We hold that Summit, because it still owned the Herby's stock, was entitled to the remedy of rescission. We overrule the fourth point of error.

SECONDARY TRADING

In their fifth point of error, Campbell Taggart and Anheuser-Busch argue that the trial court erred as a matter of law in rendering judgment because the state and federal securities acts are inapplicable to a secondary trading transaction as in this case.

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6 We are aware that the Texarkana court of appeals recently held that defrauded buyers could recover damages even though they still owned the securities. *See Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W.2d 300, 307 (Tex. App.--Texarkana), *judgment set aside and cause remanded for rendition of agreed judgment*, 840 S.W.2d 384 (Tex. 1992). We do not agree with this interpretation of the Texas statute. In any case, because damages are awarded using a rescissory measure, the distinction between the two remedies may be relatively unimportant.

A. Applicable Law

The federal district courts are split on this issue, and no federal court of appeals had directly addressed the issue as of 1990. *See Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 203 (3d Cir. 1990); *Mix v. E.F.Hutton & Co.*, 720 F. Supp. 8, 10-11 & n.3 (D.D.C. 1989). In 1991, the Third Circuit held that section 77*l* applied only to initial offerings of securities, not to after-market trading. *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 687-93 (3d Cir.), *cert. denied*, 112 S. Ct. 79 (1991).

In *Ballay*, the court first noted that the federal provision refers to misrepresentations in "a prospectus or oral communication." The court decided that the oral communication referred to must be one related to a prospectus or initial offering. The court also decided that Congress used the term "prospectus" as a term of art describing the transmittal of information concerning the sale of a security in an initial distribution. Thus, if "oral communication" was given an expansive reading, it would lead to the anomalous result that buyers could recover for negligent oral misrepresentations under section 77*l* but could only recover upon proof of scienter under section 78j(b) and SEC Rule 10b-5 if the misrepresentation was contained in a written prospectus. *Id.* at 688-89.

Secondly, the court determined that Congress generally intended to regulate initial offerings with the Securities Act of 1933, which contains section 77*l*. The Securities Exchange Act of 1934, on the other hand, was enacted to regulate securities exchanges and over-the-counter markets, where secondary trading takes place. The court relied on a House Report on the 1933 Act for the proposition that it regulates only initial offerings. *Id.* at 690.

Next, the court acknowledged that section 77q(a), although within the 1933 Act, applies to *all* trading. However, the court held that this fact did not lend support to the idea that section 77*l* also applies to all trading, basing this holding on differences of language in the two sections and the clear legislative history of section 77q(a). Finally, the court noted that, if secondary trading were actionable under section 77*l*, the use of section 78j(b) and rule 10b-5 would be eliminated because of section 77*l*'s more lenient proof requirements. *Id.* at 691-93.

Although the issue was not squarely presented, the United States Supreme Court has indicated that section 77*l* would apply to the secondary sale of all of the outstanding stock of a business. The question decided by the Court was whether the anti-fraud provisions of the 1933 and 1934 Acts apply to the sale of one hundred percent of the stock of a closely-held corporation. More specifically, the Court was addressing the argument that the stock of such a corporation is not a security covered by the Acts. *See* Landreth Timber Co .v andreth, 471 U.S. 681, 683-85 (1985). The Court held that such a transaction was subject to the Acts, specifically rejecting an argument that the Acts were intended to cover only passive investors and not privately negotiated transactions involving the transfer of control to entrepreneurs. *Id.* at 692, 697.

B. Application of Law

We find ourselves in agreement with most of what the Third Circuit court stated in *Ballay*. However, we do not believe that the court's holding was as broad as Campbell Taggart and Anheuser-Busch assert.

The *Ballay* court basically made distinctions between initial offerings of securities and secondary trading of those

securities on exchanges. When the court stated that section 77*l* applied only to initial offerings, it did so in the context of its discussion of such offerings as distinguished from secondary trading. The transaction at issue in this case is something of a hybrid, namely the sale by *one* owner of *all* of a company's stock.

As the *Ballay* court stated, the House Report on the 1933 Act noted that the statute affects only new offerings or *sales with the characteristics of new offerings*:

> The bill affects only new offerings of securities sold through the use of the mails or of instrumentalities of interstate or foreign transportation or communication. It does not affect the ordinary redistribution of securities *unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering.*

H.R. Rep. No. 85, 73rd Cong., 1st Sess. 5 (1933) (emphasis added). Elsewhere, in a part not quoted by the *Ballay* court, the report states:

> All the outstanding stock of a particular corporation may be owned by one individual or a select group of individuals. At some future date they may wish to dispose of their holdings and to make an offer of this stock to the public. Such a public offering may possess all the dangers attendant upon a new offering of securities. *Wherever such a redistribution reaches significant proportions, the distributor would be in the position of controlling the issuer and thus able to furnish the information demanded by the bill. This being so, the distributor is treated as equivalent to the original*

> *issuer and, if he seeks to dispose of the issue through a public offering, he becomes subject to the act.* The concept of control herein involved is not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is broadly defined to permit the provisions of the act to become effective wherever the fact of control actually exists.

Id. at 13-14 (emphasis added).

Thus, the legislative history indicates that section 77*l* of the 1933 Act applies to initial offerings *and* to sales of securities that have the characteristics of initial offerings due to the seller's control and access to information. The *Landreth* case decided by the United States Supreme Court supports this conclusion by holding that the sale of all of the stock of a closely held corporation is subject to the anti-fraud provisions of the 1933 Act.

We hold that section 77*l* is applicable to the transaction at issue in this case, a transaction involving the sale by one owner of all of the stock of Herby's.[7] We find nothing in the Texas statute suggesting that it does not also apply. In fact, the language in the Texas statute is arguably broader than the comparable federal language. Accordingly, we hold that the Texas statute should be applied in accordance with our interpretation of the federal statute. We overrule the fifth point of error.

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[7] We do not think that our narrow holding is inconsistent with *Ballay*. The *Ballay* court noted that the House Report indicates that sales akin to new offerings are covered by the 1933 Act. Further, applying the Act to such sales does not eliminate the usefulness of section 78j(b) and rule 10b-5, which will remain applicable to secondary sales of securities on exchanges and over-the-counter markets.

NEGLIGENT MISREPRESENTATION

We have previously held that Summit and Dunnam-Snyder's claims of negligent misrepresentation are barred by the release agreement. Therefore, all relief awarded based on those claims must be reversed. Accordingly, we need not address points of error six through ten.

REIMBURSEMENT

In points of error eleven, twelve, and thirteen, Campbell Taggart and Anheuser-Busch contend that the trial court erred in disregarding jury findings supporting recovery on the reimbursement agreement regarding the cost of processing disclosed insurance claims. They maintain in the fourteenth point of error that the trial court erred in refusing to render judgment for Campbell Taggart and Anheuser-Busch because there is no evidence or insufficient evidence to support the jury's findings of estoppel.

A. Applicable Law

The applicable rule on appellate briefing states:

> A brief of the argument may present separately or grouped the points relied upon for reversal. The argument *shall* include: (1) a fair, condensed statement of the facts pertinent to such points, *with reference to pages in the record where the same may be found;* and (2) *such discussion of the facts* and the authorities relied upon as may be requisite to maintain the point at issue.

TEX. R. APP. P. 74(f) (emphasis added). An appellant bears the burden of discussing its assertion of error and pointing

the appellate court to the portions of the record that support a complaint that jury answers are unsupported by evidence. *Barham v. Turner Constr. Co.*, 803 S.W.2d 731, 740 (Tex. App.--Dallas 1990, writ denied). An appellate court has no duty to search a voluminous record without guidance from the appellant to determine whether an assertion of reversible error is valid. *Id.*; *Most Worshipful Prince Hall Grand Lodge v. Jackson*, 732 S.W.2d 407, 412 (Tex. App.--Dallas 1987, writ ref'd n.r.e.) (en banc).

B. Application of Law

Although the jury made findings favorable to the reimbursement claim, it also made findings that Campbell Taggart and Anheuser-Busch were estopped from asserting the claim. Although Campbell Taggart and Anheuser-Busch attack the findings of estoppel, they provide no argument on the assertion that the findings are unsupported by evidence. Campbell Taggart and Anheuser-Busch do nothing more than summarily state that "there was no or insufficient evidence to support those findings," citing only to the jury findings themselves. There is no reference to the circumstances surrounding the reimbursement agreement. Essentially, there is no briefing of their contention. Because Campbell Taggart and Anheuser-Busch have waived the errror asserted in the fourteenth point of error, we overrule points of error eleven through fourteen.[8]

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[8] Summit and Dunnam-Snyder respond to point fourteen by arguing that the substantial evidence of material misrepresentations supports the jury's estoppel findings. As discussed previously in this opinion, we determined that the evidence supported the jury's findings of material misrepresentations.

COVENANT NOT TO COMPETE

Campbell Taggart and Anheuser-Busch argue in the fifteenth point of error that the trial court erred in refusing to direct a verdict and refusing to render judgment in their favor for breach of the covenant not to compete. Campbell Taggart and Anheuser-Busch contend that the agreement was breached as a matter of law. Alternatively, they maintain that the jury finding of no breach is against the great weight and preponderance of the evidence. Summit and Dunnam-Snyder argue in their second cross-point of error that any breach was excused because of impossibility of performance.

A. Pertinent Facts

Summit, Campbell Taggart, and Anheuser-Busch entered into an agreement in which Campbell Taggart and Anheuser-Busch agreed not to compete with Herby's. Summit agreed to cause Herby's to pay $500,000 in five annual installments of $100,000 to Campbell Taggart and Anheuser-Busch. Herby's paid only the first installment of $100,000. Herby's went into bankruptcy about three weeks before the second installment was due to be paid. The jury found that Summit neither breached nor repudiated the covenant not to compete agreement.

Questions asking about the affirmative defenses of estoppel, failure of consideration, and impossibility of performance were also submitted to the jury. However, because answers to those questions were conditioned upon affirmative findings of breach or repudiation, the jury did not answer the questions.

B. Applicable Law

We have previously discussed the standards of review for legal and factual insufficiency points. Because Campbell Taggart and Anheuser-Busch had the burden of proving breach of the covenant not to compete, they are asserting "matter of law" points and "against the great weight and preponderance" points. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). A party asserting a "matter of law" point must surmount two hurdles. First, the record is examined for any evidence supporting the jury's finding, disregarding all evidence to the contrary. Second, if there is no evidence to support the finding, the entire record must be examined to see if the contrary proposition is established as a matter of law. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982).

C. Application of Law

The record shows that it was undisputed that the 1988 payment of $100,000 was made. It was also undisputed that Summit did not cause Herby's to make any of the remaining payments due under the covenant not to compete. Finally, it was undisputed that Campbell Taggart and Anheuser-Busch did not compete against Herby's. Thus, there was no evidence supporting the jury's finding that Summit did not breach the contract. Further, the fact that Summit did breach the agreement was established as a matter of law.

However, Summit raised affirmative defenses of estoppel, failure of consideration, and impossibility of performance. Because the legal question of whether there was a breach of the covenant not to compete was

improperly submitted to the jury,[9] no findings were obtained upon these affirmative defenses.[10] Although Summit maintains that impossibility was established as a matter of law, we determine, based on the briefs and the record, that we cannot decide the issue as a matter of law. Thus, although we find that breach of the agreement was established as a matter of law, we conclude that we cannot render judgment on any of the affirmative defenses.[11] Accordingly, the issues regarding affirmative defenses to Summit's breach of the covenant not to compete must be remanded for further proceedings. The associated issues of entitlement to attorney fees must also be remanded. We sustain in part the fifteenth point of error, and we overrule the second cross-point.

ATTORNEY FEES

In their sixteenth and seventeenth points of error, Campbell Taggart and Anheuser-Busch contend that the trial court erred in failing to award them attorney fees. They argue that Summit and Dunnam-Snyder's contractual liability under the reimbursement agreement and covenant not to compete was conclusively established. Campbell Taggart and Anheuser-Busch also maintain that the jury's finding of no reasonable attorney fees is against the great weight and preponderance of the evidence.

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9 See our prior discussion concerning waiver of the defense of release.

10 We do not agree with Summit's assertion that the findings of estoppel made in connection with other claims can be imported as a defense to the claim of breach of the covenant not to compete.

11 Summit also argues that the covenant not to compete is unenforceable because the findings of fraud vitiate the agreement. On the briefs and record before us, we do not think that this issue is ripe for resolution as a matter of law. If Summit wishes, it may pursue the issue upon retrial following remand.

We have determined that Campbell Taggart and Anheuser-Busch waived any error regarding the jury's finding that they were estopped from recovery on the reimbursement agreement. We have also concluded that the issues concerning affirmative defenses to breach of the covenant not to compete must be remanded for further proceedings. As noted above, the right to attorney fees in connection with Summit's breach of the covenant not to compete must be resolved along with resolution of the issues concerning Summit's affirmative defenses. Accordingly, we overrule the sixteenth and seventeenth points of error.

PREJUDGMENT INTEREST

In the eighteenth point of error, Campbell Taggart and Anheuser-Busch argue that the trial court erred in awarding prejudgment interest compounded annually. They contend that simple interest is statutorily required. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 6(g) (Vernon Supp. 1993). Summit and Dunnam-Snyder disagree, and they argue in their third cross-point of error that the prejudgment interest awarded should be based on equity and increased by daily compounding.

A. Applicable Law

Section 6 of article 5069-1.05 is the result of 1987 tort reform legislation and codifies *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), with some modifications. John T. Montford & Will G. Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System*, 25 Hous. L. Rev. 59, 102-03 (1988). By its terms, section 6 applies only to wrongful death, personal injury, and property damage tort cases. *Id.*; *see Olson v. Bayland Publishing, Inc.*, 781 S.W.2d 659, 666-67 (Tex.

App.--Houston [1st Dist.] 1989, writ denied); *Crocker Nat'l Bank v. Ideco Div. of Dresser Indus., Inc.*, 739 F. Supp. 338, 340-41 (S.D. Tex. 1990) (applying Texas law), *aff'd*, 956 F.2d 265 (5th Cir. 1992). In contrast with the statutory enactments, Cavnar holds that equitable prejudgment interest is to be compounded daily. *Cavnar*, 696 S.W.2d at 554.

The Texas Legislature's codification and modification of *Cavnar* and its progeny in wrongful death, personal injury, and property damage cases did not purport to provide a statutory framework for prejudgment interest in all cases. In section 2 of article 5069-1.05, the legislature provided for interest to accrue on "all judgments." TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 2 (Vernon Supp. 1993). In section 6, however, the legislature specifically limited statutory prejudgment interest under that article to "[j]udgments in wrongful death, personal injury, and property damage cases." *Id.* § 6(a). If the legislature had intended to codify the award of prejudgment interest in all cases, section 6(a) would read "all judgments." The legislature's intent to limit the types of cases to which section 6 applies is exemplified by the addition of section 7, which specifically provides for prejudgment interest in condemnation cases. *See id.* § 7.

Wrongful death, personal injury, and condemnation are not at issue in this case. Thus, section 6 of article 5069-1.05 is applicable only if property damage is in issue. "[P]roperty damage" as used in section 6 of article 5069-1.05 means damage to tangible property, not economic loss or loss of economic opportunity. *Spangler v. Jones*, No. 05-92-01472-CV, slip op. at 14-15 (Tex. App.--Dallas May 25, 1993, n.w.h.) (en banc); *Associate Tel. Directory Publisher, Inc. v. Five D's Publishing Co.*, 849 S.W.2d 894, 900 (Tex. App.--Austin 1993, no writ).

B. Application of Law

The damages which were in issue in this case do not constitute "property damage" as that term is used in section 6 of article 5069-1.05; therefore, *Cavnar* controls the awarding of prejudgment interest. *Id.* The trial court erred in awarding prejudgment interest to be compounded annually. Pursuant to *Cavnar*, prejudgment interest to be compounded daily should have been awarded. Summit and Dunnam-Snyder's third cross-point of error is sustained. We overrule Campbell Taggart and Anheuser-Busch's eighteenth point of error.

DISPOSITION

We reverse that part of the trial court's judgment rendered in favor of Dunnam-Snyder, and we render judgment that Dunnam-Snyder take nothing. We modify the award of prejudgment interest to Summit to the extent that it provided for compounding annually. Consistent with this opinion, we modify the trial court's award of prejudgment interest to provide for compounding daily. In all other respects, we affirm that part of the judgment rendered in favor of Summit.[12] Further, we render judgment that Summit breached the covenant not to compete as a matter of law, and we remand this cause to the trial court solely for (1) recomputation of the prejudgment interest award in accordance with this opinion, (2) adjudication of any issues concerning Summit's affirmative defenses to the breach of the covenant not to compete, and

---

[12] We do not reach Summit's first cross point of error as it was conditioned upon reversal of the award in favor of it.

(3) resolution of the question of entitlement to damages and any attorney's fees in connection with the claim that Summit breached the covenant not to compete. *See* TEX. R. APP. P. 81(b)(1), (c).

/S/
WILL BARBER
JUSTICE

Publish
Tex. R. App. P. 90

920389F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Appellants

No. 05-92-00389-CV V.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Appellees

Appeal from the 160th Judicial District Court of Dallas County, Texas (Tr. Ct. No. 88-13482-H).

Opinion delivered by Justice Barber, Justices Baker and Chapman also participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** in part, **AFFIRMED** in part, **MODIFIED**, and **REMANDED** as follows. That part of the trial court's judgment rendered in favor of The Dunnam-Snyder Company is **REVERSED**, and judgment is **RENDERED** that the Dunnam-Snyder Company take nothing. That part of the trial court's judgment awarding prejudgment interest, *compounded annually*, to Summit Coffee Company is **MODIFIED** to provide that the prejudgment interest awarded to Summit Coffee Company should be *compounded daily*. Judgment is

further **RENDERED** that Summit Coffee Company breached the covenant not to compete as a matter of law. This cause is **REMANDED** to the trial court solely for (1) recomputation of the prejudgment interest award with *daily compounding* from October 26, 1987, through October 9, 1991; (2) adjudication of any issues concerning Summit Coffee Company's affirmative defenses to its breach of the covenant not to compete; and (3) resolution of damages and entitlement to any attorney fees in connection with the claim of breach of the covenant not to compete. In all other respects, the judgment of the trial court in favor of Summit is **AFFIRMED**.

It is **ORDERED** that appellants Anheuser-Busch Companies, Inc. and Campbell Taggart, Inc. recover their costs of this appeal from appellees Summit Coffee Company and The Dunnam-Snyder Company. The obligations of Gardere & Wynne, a Registered Limited Liability Partnership, as surety on appellants' cost bond are **DISCHARGED**.

Judgment entered June 9, 1993.

/S/
WILL BARBER
JUSTICE

APPENDIX C

No. 88-13482

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	OF DALLAS COUNTY, TEXAS
v.	§	
SUMMIT COFFEE COMPANY, ET AL.,	§	
Defendants.	§	160TH JUDICIAL DISTRICT

FINAL JUDGMENT

On July 8, 1991, Plaintiffs Anheuser-Busch Companies, Inc. ("Anheuser-Busch") and Campbell Taggart, Inc. ("Campbell Taggart") (collectively the "Plaintiffs") and Defendants Summit Coffee Company ("Summit Coffee"), The Dunnam-Snyder Company ("Dunnam-Snyder"), The Snyder Company, William K. Snyder, Sam W. Dunnam, III, Sam W. Dunnam, Jr., S. W. Dunnam Trust Estate, Louise M. Dunnam Trust Estate, Sam W. Dunnam, III Trust, Mr. and Mrs. Samuel Dunnam, Jr. Trust of 1979, and the Snyder Children's Trust of 1984 (collectively the "Defendants") appeared by their attorneys of record and announced ready

for trial. A jury consisting of twelve good and lawful jurors was duly impaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury on general questions. The charge of the Court, including the general questions and the verdict of the jury, are incorporated herein for all purposes by reference. The Court, having considered the jury's verdict and the post-trial motions filed by the parties, is of the opinion that Summit Coffee and Dunnam-Snyder are entitled to recover judgment against Anheuser-Busch and Campbell Taggart as set forth below; it is therefore

ORDERED that Summit Coffee have and recover judgment against Anheuser-Busch and Campbell Taggart, jointly and severally, in the sum of $5,500,000.00 together with prejudgment interest on the $5,500,000.00 at the rate of 10.00% per annum compounded annually from October 26, 1987, through the date prior to judgment in the sum of $2,529,870.00 for a total of $8,029,870.00; it is further

ORDERED that Summit Coffee have and recover judgment against Anheuser-Busch and Campbell Taggart, jointly and severally, for attorney's fees in the sum of $200,000.00 for services rendered through the trial of this case, and the further sum of $20,000.00 in the event of an appeal to the Court of Appeals, and the further sum of $10,000.00 in the event of an application for writ of error to the Supreme Court of Texas, and the further sum of $10,000.00 in the event of an appeal to the Supreme Court of Texas if writ is granted; it is further

ORDERED that this award of attorneys' fees is part of the judgment hereby rendered; it is further

ORDERED that Dunnam-Snyder have and recover judgment against Anheuser-Busch and Campbell Taggart,

jointly and severally, in the sum of $4,000,000.00 together with prejudgment interest on the $4,000,000.00 at the rate of 10.00% per annum compounded annually from September 7, 1989, through the date prior to judgment in the sum of $885,467.00 for a total of $4,885,467.00; it is further

ORDERED that Dunnam-Snyder have and recover judgment against Campbell Taggart in the sum of $200,000.00 for punitive damages; it is further

ORDERED that Dunnam-Snyder have and recover judgment against Anheuser-Busch in the sum of $200,000 for punitive damages; it is further

ORDERED that the judgment hereby rendered shall bear interest at the rate of 10.00% per annum compounded annually on all sums herein awarded from the date of judgment; it is further

ORDERED that all costs of court expended or incurred in this case are hereby taxed and adjudged against Anheuser-Busch and Campbell Taggart, jointly and severally, and all writs and processes necessary for the enforcement and collection of this judgment or the costs of court may issue as necessary; and it is further

ORDERED that all other relief not expressly granted herein is DENIED.

SO ORDERED.

SIGNED this 10th day of October, 1991.

/S/
JUDGE PRESIDING

No. 94-0379

OCT 5 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Petitioners,

vs.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas for the Fifth District of Texas at Dallas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether section 12(2) of the Securities Act of 1933 applies to a sale of securities procured through misrepresentations in a prospectus used to procure the sale.

2. Whether section 12(2) of the Securities Act of 1933 provides a remedy to a defrauded buyer of securities who timely tendered the securities to the seller upon discovering the seller's misrepresentations.

3. Whether section 14 of the Securities Act of 1933 ensures that only known claims under section 12(2) are waived.

LIST OF PARTIES

Petitioners: Anheuser-Busch Companies, Inc. and Campbell Taggart, Inc.

Respondents: Summit Coffee Company and The Dunnam-Snyder Company[1]

1. Pursuant to Sup. Ct. R. 15.2 and 29.1, Respondents certify that S.W. Dunnam Trust Estate, Louise M. Dunnam Trust Estate, Sam W. Dunnam, III Trust, Mr. and Mrs. Samuel Dunnam Trust of 1979, and Snyder Childrens' Trust of 1984 are all of the parent entities of The Dunnam-Snyder Company. Summit Coffee Company is a subsidiary of The Dunnam-Snyder Company.

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APPENDIX

Appendix A — Statutory Provisions 1a

FORWARD

The statement of facts, *i.e.*, trial testimony, will be cited as "SF." followed by the volume(s) and page number (s) to which reference is made.

The transcript, *i.e.*, trial pleadings, will be cited as "Tr." followed by the page number (s) to which reference is made.

Exhibits will be cited as identified in the trial court, *e.g.*, "Def. Ex.," "Ely Ex.," followed by the exhibit number.

Unless otherwise indicated, all emphasis is supplied by counsel.

No. 94-0379

In The

Supreme Court of the United States

October Term, 1994

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Petitioner,

vs.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas for the Fifth District of Texas at Dallas

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Summit Coffee Company ("Summit") and The Dunnam-Snyder Company ("Dunnam-Snyder") (collectively "Respondents") request that this Court deny the petition for writ of certiorari to review the judgment of the Court of Appeals of Texas entered on June 9, 1993. The Texas Supreme Court denied review.

STATUTES INVOLVED

Federal Statutes:

15 U.S.C.A. (West 1988):
§ 77b(10)
§ 77l(2)
§ 77n

State Statutes:

Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1994):
art. 581-33A(2)
art. 581-33D
art. 581-33E
art. 581-33L

The federal statutes were reproduced in full in the petition. The state statutes are reproduced in full in Appendix A to this brief.

STATEMENT OF THE CASE

Petitioner Campbell-Taggart, Inc. ("Campbell-Taggart") purchased all of the stock of Herby's Foods, Inc. ("Herby's") in 1981 for between $10 and 11 million. [SF. III - 2-3; Ely Ex. 14]. Over the next five years, Campbell Taggart took Herby's from a company earning over $1 million per year to a company losing $1 million per year. [Ely Ex. 14; SF. VI - 617-20, 643-44; VII - 814]. Consequently, Petitioners identified Herby's as a divestiture candidate and spoke to several companies about a possible sale. [SF. III - 13-16; VII - 897-98, 902-03, 912]. They finally sold Herby's stock to Summit for $5.5 million. [Ely Ex. 52A; SF. II - 144; III -95]. However, Petitioners procured the sale only through several critical misrepresentations in the prospectus used to solicit the sale as well as other documents they provided Summit while it investigated Herby's.

First, Petitioners misrepresented the rental rate, termination, and substitute vehicle provisions of the lease which provided Herby's the vast majority of its distribution capability. The true terms made Summit's corporate plan for the acquisition unworkable. [Def. Ex. 8; Ely Ex. 14; SF. IV - 255-56; VI - 629; Def. Ex. 10; SF. IV - 262-64; VI - 630-31; VII - 925; III - 236-38]. Second, Petitioners misrepresented the number of legal claims pending against Herby's as of the closing. They failed to disclose at least 21 known claims, which ultimately cost well over ten percent of the purchase price to resolve. This enabled Petitioners to induce Summit to close the stock purchase even though Petitioners revealed at the very last minute the disproportionately large deductibles under their insurance program that covered Herby's. Summit nearly abandoned the deal. Had it known of the undisclosed claims, Summit would have. [SF. I - 272-77; II - 178-80; III - 34-7; VIII - 1034-35; IV - 278].

Presented with almost two weeks of evidence, the jury found that Petitioners violated the Texas Securities Act (the "Texas Act"), in particular Tex. Rev. Civ. Stat. art. 581-33A(2), and section 12(2) of the Securities Act of 1933.[2] Because the jury also found that Summit timely tendered the stock back to Petitioners, the trial court allowed Summit the only remedy available under the Texas Act and section 12(2) by awarding Summit the price paid for the stock less any income received. Summit was also awarded pre- and post-judgment interest and attorneys' fees under Texas law.

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2. Campbell Taggart, as the seller, was found to have directly violated both the Texas Act and section 12(2), and Anheuser-Busch Companies, Inc. ("Anheuser-Busch") was held liable as a controlling person who aided Campbell Taggart in its violations. [Tr. 707, 709, 713]. Of course, Anheuser-Busch could be held liable as an aider only under the Texas Act. *Compare* Tex. Rev. Civ. Stat. Ann. art. 581-33F(2) (aider liability provided by statute) *with Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1449 (1994) (section 12 "limits liability to those who offer or sell the security").

The Texas Court of Appeals (the "Texas court"), finding that the Texas Act "is arguably broader than the comparable federal language," affirmed the trial court's judgment under both the Texas Act and section 12(2). The Texas Supreme Court denied Petitioners' application for writ of error therefore finding that the application presented no error which either required reversal or was of such importance to the jurisprudence of the state as to require correction. Tex. R. App. P. 133(a). Petitioners' motion for rehearing on their points of error was overruled.

REASONS FOR DENYING THE WRIT

Despite Petitioners' claim to the contrary, the court's decision in *Gustafson v. Alloyd Co.*, No. 93-404, *cert. granted*, 114 S. Ct. 1215 (1994), cannot disturb Summit's judgment against Petitioners. This case, unlike *Gustafson*, involves the application of the Texas Act that applies to any and all sales of securities.[3] Because Summit's recovery is based on the Texas court's construction and application of the Texas Act which applies to Petitioners' fraud even if section 12(2) does not, the Court lacks jurisdiction to review and should not review this state law-based judgment.

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3. Petitioners' conclusion in their footnote 8 that the Texas court did not independently analyze the Texas Act is simply incorrect. As discussed below, the Texas court specifically analyzed and applied the Texas Act. Further, while Texas courts commonly review federal decisions when interpreting state securities laws, Texas courts, including this one, have consistently stated that such decisions are used only as "guides." *Anheuser-Busch Cos. v. Summit Coffee Co.*, Pet. A23; *First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart*, 648 S.W. 2d 410, 414 (Tex. App. — Dallas 1983, writ ref'd n.r.e.). In fact, Texas courts will not follow federal decisions when "statutorily or constitutionally mandated [by state law] to do otherwise." *Brown v. State*, 657 S.W. 2d 797, 799 (Tex. Crim. App. 1983) (en banc).

A. The Judgment Rests on Adequate and Independent State Grounds.

Under the plain statement test adopted in *Michigan v. Long*, 463 U.S. 1032 (1983):

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion *that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached*. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, *will not undertake to review the decision.*

Id. at 1041.[4] Only when the state court's decision "fairly appears" to rest primarily on federal law will the Court presume that independent and adequate state grounds do not exist. *Id.* at 1042.

In this case, the Texas court plainly stated that federal precedent was used to guide – not compel -- its conclusions under the Texas Act. Finding the language in the Texas Act "arguably broader" than the federal statute, the Texas court simply applied the Texas Act in this case. Consequently, having satisfied the plain statement test announced in *Long*, further review is precluded. *Long*, 463 U.S. at 1041; *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977); *Herb*, 324 U.S. at 125.

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4. This principle, at least in part, is based on the Court's jurisdictional limitations as proscribed by Article III of the United States Constitution. *Id.* at 1041-42 (citing *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)).

1. *The Texas Act Is Adequate to Support the Judgment.*

Even if the Court ultimately concludes section 12(2) does not apply to a privately negotiated stock sale, that decision would not change the inescapable conclusion that the Texas Act applies to all sales of securities, including the one at issue in this case.[5] Therefore, review of this case by the Court would be futile.[6]

A cursory review of the Texas Act reveals that the Texas court properly employed state law to affirm the judgment against Petitioners. The Texas Act provides that:

> A person who offers or sells a security . . . by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him. . . .

---

5. In fact, even if the Court remanded this case, Petitioners would be precluded from arguing otherwise due to their failure to challenge the applicability of the Texas Act in either their motion for rehearing to the Texas court or their application for writ of error to the Texas Supreme Court. Tex. R. App. P. 131(e); *Albright v. City of Houston*, 677 S.W. 2d 487, 488 (Tex. 1984); *Sullivan v. University Interscholastic League*, 616 S.W. 2d 170, 173 (Tex. 1981).

6. The Court in *Long* did not foreclose in all instances the need to examine state law. *Long*, 463 U.S. at 1041 & n.6; *see Valley Forge Christian College v. Americans United For Sep. of Church & State, Inc.*, 454 U.S. 464, 472 (1982) ("[A]t an irreducible minimum, Art. III requires the party who evokes this court's authority to show that he personally has suffered " 'an injury that . . . is likely to be redressed by a favorable decision' "). Review of state law in this case is appropriate to ensure that the Court does not issue what is or will certainly become no more than an advisory opinion. *See Long*, 463 U.S. at 1042; *Herb*, 324 U.S. at 125.

Tex. Rev. Civ. Stat. Ann. art. 581-33A(2) (Vernon Supp. 1994). The statute applies to any "person who offers or sells a security." "Sells," in turn, includes "every . . . attempt to dispose of a security for value." Tex. Rev. Civ. Stat. Ann. art. 581-4E (Vernon Supp. 1994). Most importantly, unlike section 12(2) which applies to misrepresentations in a "prospectus or oral communication" (the language Petitioners contend restricts section 12(2) to public offerings), the Texas Act applies to any untrue statement or omission no matter the means of communication.

Any possible uncertainty about the breadth of the Texas Act is resolved by the drafters' comments where they used a secondary market transaction to illustrate its application. They stated:

> Example: X makes a secondary offering of Y Co. shares owned by him, at $10 a share, and the shares trade at a premium in the aftermarket, where P buys them at $12. . . . [P] may recover $12 from the person selling to him if that person has violated § 33A(2).

Tex. Rev. Civ. Stat. Ann. art. 581-33D cmt. (Vernon Supp. 1994). The drafters specifically recognized that a secondary market seller can be liable for the purchase price if he violates the Texas Act. As such, whether this case involves a privately negotiated rather than a public sale or an initial rather than a secondary offering is of no moment. *See, e.g., Comeau v. Rupp*, 810 F. Supp. 1127, 1157-58 (D. Kan. 1992) (Kansas securities act, which contains same language as the Texas Act, applies to all securities sales).

There is seemingly no disagreement that the Texas Act applies to all securities sales. For example, Petitioners themselves argue with respect to section 12(2) that "[i]f Congress had intended to create a remedy that applied to all securities sales, it could simply have left out [the] crucial phrase [by means of a prospectus or oral

communication]." Pet. 14. The petitioners in *Gustafson* as well as *amicus curiae* supporting them make the same argument. Brief for Petitioners, *Gustafson v. Alloyd Co., Inc.* No. 93-404, 1994 WL 178124 *15 (May 6, 1994); Brief of *Amicus Curiae* Securities Industries Association, Inc. In Support of Petitioners, *Gustafson v. Alloyd Co., Inc.*, No. 93-404, p. 9 (May 6, 1994). Of course, Texas Legislature left out the phrase by means of a prospectus or oral communication.

The uniform language and structure of the Texas Act, prior opinions construing those provisions, and the drafters' comments make clear that there is no public or initial offering limitation under art. 581-33A(2).[7] The jury found that Petitioners violated the Texas Act [Tr. 703-05], and the Texas court applied that finding in affirming the judgment. This entitled Summit to recover rescissory damages, pre- and post-judgment interest, and attorneys' fees measured by state law.[8] *Anheuser-Busch Cos.*, Pet. A24, 33-6. Therefore, as the state ground alone is broad enough to support the judgment, adequacy is established. *Eustis v. Bolles*, 150 U.S. 361, 370 (1893); *Beaupre v. Noyes*, 138 U.S. 397, 401 (1891); *Murdock v. Memphis*, 20 Wall. 590, 636 (1874). Further, because review

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7. Even if section 12(2) applies only to public offerings, contrary to this Court's holding in *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), the evidence submitted to the jury was sufficient to sustain a finding that this sale involved a public offering. [SF. III - 13-16; VII - 902-03]. Moreover, the trial court defined "prospectus" for the jury in its charge. [Tr. 710]. Therefore, the jury specifically found that Petitioners made their misrepresentations by means of a prospectus or oral communication within the meaning of section 12(2). As Petitioners have never asserted that this finding was not supported by sufficient evidence, it is binding on the parties and must be treated as conclusively established. *Anheuser-Busch Cos.*, Pet. A12-3.

8. Summit, of course, could not have recovered attorneys' fees under the Securities Act of 1933. *Melton v. Unterreiner*, 575 F.2d 204, 209 (8th Cir. 1978); *Aronson v. TPO, Inc.*, 410 F. Supp. 1375, 1380 (S.D.N.Y. 1976). And while (Cont'd)

would at best cause the rendition of an advisory opinion, the petition for writ of certiorari should be denied.

2. *The Texas Court Independently Applied State Law.*

Unlike the state court in *Long*, the Texas court stated throughout its opinion that its decision rested on its interpretation of Texas law. For example, the Texas court expressly disagreed with its sister court's interpretation of art. 581-33A(2). The Texas court stated:

> We are aware that the Texarkana court of appeals recently held that defrauded buyers [under art. 581-33A(2)] could recover damages even though they still owned the securities. *See Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W. 2d 300, 307 (Tex. App. — Texarkana), *judgment set aside and cause remanded for rendition of agreed judgment*, 840 S.W. 2d 384 (Tex. 1992). We do not agree with this interpretation of the Texas statute. In any case, because damages are awarded using a rescissory measure, the distinction between the two remedies may be relatively unimportant.

Anheuser-Busch Cos., Pet. A24 n. 6.[9] *Cf. Long*, 463 U.S. at 1043 ("not a single state case was cited to support the state court's holding"). As such, the Court cannot presume that federal law compelled the Texas court's decision. *Coleman v. Thompson*, 111

(Cont'd)
Summit could have been awarded pre- and post-judgment interest under federal law, the Texas court did not even consider federal law when determining the applicable interest rates. *Anheuser-Busch Cos.*, Pet. A34-6.

S. Ct. 2546, 2558 (1991) ("*Per se* rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time").

The Texas court did not stop there. It plainly stated that the federal cases it cited were only "reliable guides" in interpreting the Texas Act. *Anheuser-Busch Cos.*, Pet. A23. This wording fits precisely into the plain statement test announced in *Long*. 463 U.S. at 104 ("a plain statement in [the state court's] . . . opinion that the federal cases are being used only for the purpose of *guidance*"). Moreover, the Texas court concluded that "the Texas Legislature" did not intend an inability to return both parties to the status quo to bar the sole remedy available under the Texas Act. *Anheuser-Busch Cos.*, Pet. A24. The intent of the Texas Legislature would be immaterial had the Texas court felt compelled to follow federal law.[10]

In addition, the Texas court chose to "*adopt* and follow *the reasoning* and holdings in the . . . cited federal cases *in applying the Texas anti-waiver provision.*" *Anheuser-Busch Cos.*, Pet. A12. To "adopt" means "to take by choice . . .; to take voluntarily. . . ." Websters Ninth New Collegiate Dictionary 58 (1983). On the other hand, to "compel" means "to drive or urge forcefully and irresistibly," the antithesis of a voluntary choice to adopt. *Id.* at 268. Although persuaded by the federal courts' reasoning, the Texas court independently applied the Texas anti-waiver provision.

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9. No federal securities law claim was raised in the *Lutheran Bhd.* case.

10. The Texas court also stated that it agreed "with most [but not all] of what the Third Circuit stated in *Ballay*." *Anheuser-Busch Cos.*, Pet. A26. Again, the Texas court by this statement signified its respectful independence from federal precedent.

Finally, in its most forceful and direct statement demonstrating its independent application of the Texas Act, the Texas court stated that:

> We find *nothing in the Texas statute* suggesting that it does not also apply. In fact, *the language of the Texas statute is arguably broader* than the comparable federal language.

Anheuser-Busch Cos., Pet. A28. These statements alone establish the independence of the Texas court's application of state law.

The plain statement test does not require the use of any particular phraseology to establish the independence of a court's decision under state law. *See Sochor v. Florida*, 112 S. Ct. 2114, 2119-20 (1992) (state court's statement that claim was "not preserved for appeal" amounted to plain statement sufficient under *Long*); *Ylst v. Nunnemaker*, 111 S. Ct. 2590, 2595-6 (1991) (later unexplained order upholding judgment and rejecting the same claim presumed to rest on the same ground); *Coleman*, 111 S. Ct. at 2558-60 (1991) (Virginia court's decision fairly appeared to be based on state grounds even though no express statement to that effect was made); *Long*, 463 U.S. at 1040 (presumption that decision is not based on independent grounds only arises if opinion "fairly appears" to rest on federal law).

Moreover, state courts should be given the opportunity "to develop state jurisprudence unimpeded by federal interference." *Long*, 463 U.S. at 1041. The Texas court took that opportunity in this case. To grant review would unnecessarily undermine this development of Texas securities law and infringe on the ability of Texas courts to independently develop and refine that law in the future. Few times have courts interpreted the Texas Act. This rare opinion, merely looking to federal decisions for guidance in the development of Texas law, should not be lightly cast aside.

The Texas court was satisfied that the Texas Act applied to this transaction as it "is arguably broader than the comparable federal language." *Anheuser-Busch Cos.*, Pet. A28. Therefore, the court cautiously applied the Texas Act "in accordance with [its] interpretation of the federal statute." *Id.* The Texas court judiciously avoided unnecessary discussion of the state law leaving to another day deliberation of the outer limits of the Texas Act. It would be imprudent for this Court to demand that a state court do any more than apply the state's law to the facts of the particular case before it.

In summary, the Texas court's decision to use federal law as a "reliable guide," determine the intent of the Texas Legislature, state that the Texas statute applied and was broader than the federal language, voluntarily "adopt" reasoning in federal cases, and discuss and disagree with another state court decision construing the Texas Act fulfills the plain statement test announced in *Long*. Consequently, the *Long* presumption for Supreme Court jurisdiction does not arise and review of this case would be an improper exercise of this Court's jurisdiction. *Coleman*, 111 S. Ct. at 2558; *Long*, 463 U.S. at 1040-41.

B. The Texas Court Awarded the Only Available Remedy.

So-called rescissory damages are the only remedy available under section 12(2) and the Texas Act for a defrauded buyer who still owns the stock which the seller induced it to purchase through material misrepresentations. 15 U.S.C.A. § 771(2) (West 1988); Tex. Rev. Civ. Stat. Ann. art. 581-33A(2), D(1) (Vernon Supp. 1994). Quite simply, section 12(2) and the Texas Act mandate that a defrauded buyer recover the consideration paid for the stock less any income received on the security. *Randall v. Loftsgaarden*, 478 U.S. 647, 655-56 (1986); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287-88 (1940). Petitioners finally concede this point, albeit only as to section 12(2). Pet. 23. Petitioners, of course, ignore the fact that the Texas court specifically awarded this relief

under the Texas Act independently of its discussion of section 12(2) and *Randall.* As discussed above, this adequate and independent state ground for the judgment below leaves no reason for the Court to review the decision.

Further, the Texas court's application of *Randall* is anything but controversial. Indeed, Petitioners do not cite any case which disparages, disagrees with, or draws into question this Court's unequivocal pronouncement that the sole remedy available under section 12(2) is recovery of the purchase price, plus interest, less any income the buyer received on the security. Without a conflict in decisions, there is no special or important reason for review. *See* Sup. Ct. R. 10.1.

Section 12(2) itself does not even speak of rescission but rather in clear and unequivocal terms prescribes the relief to be given. Nonetheless, Petitioners leap from this Court's shorthand description of that relief as "rescissory damages" to the conclusion that common law equitable principles govern the availability of this lone remedy. Nothing in the statute dictates that result.

The only condition for recovery is the defrauded buyer's tender of the security to the seller. *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1034 (2d Cir. 1979). For purposes of section 12(2), tender of the stock returns the parties to the status quo. *Id.* at 1035; *Chapman v. Dunn,* 414 F.2d 153, 160 (6th Cir. 1969); *Stadia Oil & Uranium Co. v. Wheelis,* 251 F.2d 269, 274 (10th Cir. 1957). There is no dispute that Summit tendered Herby's stock to Petitioners immediately upon learning of the misrepresentations. The jury found that Summit notified Petitioners within a reasonable time of its intention to rescind the transaction and offered to return Herby's stock to Cambell Taggart. [Tr. 716].

Moreover, the jury found that Summit neither knew of nor should have discovered Petitioners' misrepresentations until

August 12, 1988. [Tr. 764]. By October 1988, Summit had sued Petitioners under section 12(2) and the Texas Act. In the interim, Summit did not ratify the stock purchase [Tr. 765], did nothing to estop itself from asserting its claims [Tr. 767], and did nothing to cause the value of Herby's stock to decline. [Tr. 768]. The jury further found that Summit's claims under neither section 12(2) nor the Texas Act were barred by laches. [Tr. 706, 712]. Consequently, the fact that the parties could not be returned to the status quo is immaterial.

Even under equitable principles, the trial court would have acted well within its discretion in rescinding the transaction.[11] For example, in its pre-*Randall* opinion, the court in *Gannett Co. v. The Register Publishing Co.*, 428 F. Supp. 818 (D. Conn. 1977), rejected a rescission claim only after finding that the buyer knew of the fraud almost immediately after the transaction closed but failed to promptly tell the seller that it intended to rescind and ratified the transaction. *Id.* at 832-33, 837, 839. Of course, the jury in this case found exactly the opposite. Moreover, the court in *Gannett* emphasized that rescission might have been appropriate if the only objection had been an alleged inability to return the parties to the status quo due to a decline in the market value of the stock. *Id.* at 826, 831 n.32, 840. Indeed, the court noted that if that were the sole objection it would have had to determine whether the decline was the buyer's fault. *Id.* at 840.

Here, of course, Summit did not cause a decline in the value of Herby's stock. Rather, Summit's parent, Dunnam-Snyder, infused almost $3.4 million into Herby's trying to keep it alive while this litigation dragged on. [Def.Ex. 16; SF. III - 213-14; V - 472-73; VI - 607-08, 629]. Unable to fund Herby's further, Respondents placed it into bankruptcy.

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11. Summit further questions Petitioners' implied claim that a review of the trial court's exercise of its equitable powers raises a special or important issue for this Court's review. *See* Sup. Ct. R. 10.1.

Of course, even the court in *Johns Hopkins Univ. v. Hutton*, 297 F. Supp. 1165 (D. Md. 1968), *aff'd in part and rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974), would have rescinded the transaction in this case. That court observed that a seller of securities liable under section 12(2) "should not be able to shield itself from rescission by complaining that [the buyer] used bad judgment in trying to protect its investment." *Id.* at 1225. Noting that this is the only remedy available to a defrauded buyer who still owns the security, the court refused to resolve the issue of how far the security can be changed before the remedy is no longer available. *Id.* at 1226. Rather, it concluded that "the provisions of Section 12(2) and the equities of this case call for the application of the remedy of rescission." *Id.* at 1226. Even with respect to the latter, the court considered only whether the buyer made an adequate, timely tender of the stock, which it did by suing for rescission. Like this case, the court found that the buyer had only taken those steps it felt advisable to protect its investment. *Id.* at 1224-25. That court would also have visited any decline in the value of Herby's stock on Petitioners.

Petitioners' reliance on *Bridgen v. Scott*, 456 F. Supp. 1048 (S.D. Tex. 1978), is similarly ill-founded. There, the court refused to rescind the transaction only because the plaintiffs delayed seeking rescission for 20 months after they learned of the fraud. *Id.* at 1059-60. Although the court noted that rescission generally calls for cancellation of the bargain and return of the parties to the status quo, the case relied upon by the court also held that "where this is impossible because of the disposal or retirement of the stock, . . . what restitutional damages are to be awarded must depend upon the facts of the particular case." *Id.* at 1059 (quoting *Myzel v. Fields*, 386 F.2d 718 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968)).

Moreover, the *Bridgen* court specifically noted that but for lack of proof, plaintiffs might have been entitled to rescissory

damages under *Garnatz v. Stifel, Nicholaus & Co.*, 559 F.2d 1357 (8th Cir. 1977). The *Garnatz* court specifically held that rescissory damages were appropriate to compensate the plaintiff for the decreased value of the bonds purchased despite the fact that none of the defendants caused the bonds to decline in value. *Id.* at 1361.

Finally, Petitioners' quote from *Wigand* is out of context and utterly disregards the court's holding. The court held that "[t]he value of the stock itself is irrelevant insofar as relief under section 12(2) is concerned." *Wigand*, 609 F.2d at 1036. Quite simply, the court appreciated Congress' ability to say what it meant. Congress said that the violator "shall be liable" for "the consideration paid . . . less the amount of any income received . . . upon tender of such security. . . ." 15 U.S.C.A. § 771(2) (West 1988). That is the remedy the *Wigand* court imposed, and the relief the Texas court was required to give in this case. *See also Casella v. Webb*, 883 F.2d 805,808-09 (9th Cir. 1989) (rescissory damages are the only remedy even where the company invested in is in bankruptcy).

Petitioners admit that a rescissory damage award is the only remedy available under section 12(2) for a defrauded buyer who still owns the security but would have this Court deny that relief because Summit asserted other theories of recovery. Petitioners cite no precedent for this odd jurisprudence. Since Summit prevailed on all of its claims, it is entitled to select the remedy most favorable to it. *Randall*, 478 U.S. at 667 (Blackmun, J., concurring). Summit chose to recover rescissory damages under the Texas Act which allowed it to recover very favorable rates of pre-and post-judgment interest and attorneys' fees not available under federal law. There is no compelling reason for this Court to review that award.

C. Summit Did Not Knowingly Release Its Claims.

Section 3 of the purchase agreement required Campbell Taggart to prepare and deliver to Summit a post-closing balance sheet to be used in determining the adjustment to the purchase price required by section 2. The adjustment was to be calculated by tallying Herby's current assets and current liabilities as of the closing. [Ely Ex. 52A]. The purchase agreement expressly provided for the future execution of mutual releases relating to the adjustment.

During this adjustment period, a dispute arose over Petitioners' representations in section 8.4(c) of the agreement relating to Herby's inventory. That isolated dispute was resolved on February 1, 1988, by an agreement regarding the post-closing adjustment to the purchase price. Of course, Summit neither knew of nor should have discovered Petitioners' misrepresentations by that time. Rather, the jury found that Summit did not know and should not have learned of these misrepresentations until August 12, 1988, some six months after the post-closing adjustment was made. [Tr. 764]. Not surprisingly, therefore, the agreement does not mention those claims.

The Texas court found that Summit's unknown claims could not be released in the face of the anti-waiver provisions of both the federal and Texas acts. *Anheuser-Busch Cos.*, Pet. A11-13. Although no court has found either law to prohibit the settlement or release of known matured claims, the lower courts have scrupulously preserved such claims from unintentional or involuntary waiver. *E.g., Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1340-41 (9th Cir. 1992); *Hamilton v. Harrington*, 807 F.2d 102, 106 (7th Cir. 1986); *Burgess v. Premier Corp.*, 727 F.2d 826, 831 (9th Cir. 1984); *Goodman v. Epstein*, 582 F.2d 388, 402-03 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Murtaugh v. University Computing Co.*, 490 F.2d 810, 816-17 (5th Cir.), *cert.*

denied, 419 U.S. 835 (1974); *American Gen. Ins. Co. v. Equitable Gen. Corp.*, 493 F. Supp. 721, 750-51 (E.D. Va. 1980) (applying both federal and Texas law). Because the jury specifically found that Summit neither knew nor should have known of the misrepresentations at the time the agreement was signed, the Texas court naturally rejected Petitioners' claim that the federal and state securities claims were barred.

The decision in *Petro-Ventures* is not to the contrary. First, the court reaffirmed that a release is generally valid only as to claims actually known and mature at the time of the release. 967 F.2d at 1340-41. Summit's claims were neither known nor mature. Second, the Ninth Circuit deferred to the trial court's factual conclusion as to the intent of the release based on extrinsic evidence. *Id.* at 1339-40. In this case, the trial court simply accepted the jury's finding which has never been attacked by Petitioners. As such, Petitioners' jury argument in their petition to the effect that Summit had the means of learning of the misrepresentations before it signed the release is simply irrelevant.

Moreover, this case does not fit into the limited ruling announced in *Petro-Ventures*. Petitioners and Summit were not in litigation when the release was signed. The *Petro-Ventures* court decided only the "validity of a release of all unknown claims in the context of a settlement of on-going litigation. . . ." *Id.* at 1338. As in the Ninth Circuit's earlier decision in *Burgess*, which the *Petro-Ventures* panel did not purport to overturn, Petitioners and Summit were still dealing with each other in a purely business relationship when the adjustment to the purchase price was made. Even the *Petro-Ventures* panel acknowledged that under such circumstances the general rule applied in *Burgess* would control. *Id.* at 1341-42.

Petitioners want this Court to ignore the jury's finding that Summit neither knew of nor should have known that Petitioners had defrauded Summit until well after Summit settled the post-

closing adjustment. Yet, they have never attacked that finding. That is precisely why the Texas court rejected Petitioners' point of error below. *Anheuser-Busch Cos.*, Pet. A12-13. The Texas court accepted the consensus among the courts that an unknown claim cannot unintentionally be waived under section 12(2) and the Texas Act. There is simply no compelling reason for this Court to review that decision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — STATUTORY PROVISIONS

Tex. Rev. Civ. Stat. Ann. art. 581-33A(2) (Vernon Supp. 1994), provides:

A. Liability of Sellers.

* * *

(2) Untruth or Omission. A person who offers or sells a security (whether or not the security or transaction is exempt under Section 5 or 6 of this Act) by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him, who may sue either at law or in equity for rescission, or for damages if the buyer no longer owns the security. However, a person is not liable if he sustains the burden of proof that either (a) the buyer knew of the untruth or omission or (b) he (the offeror or seller) did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. The issuer of the security (other than a government issuer identified in Section 5M) is not entitled to the defense in clause (b) with respect to an untruth or omission (i) in a prospectus required in connection with a registration statement under Section 7A, 7B, or 7C, or

(ii) in a writing prepared and delivered by the issuer in the sale of a security.

Tex. Rev. Civ. Stat. Ann. art. 581-33D (Vernon Supp. 1994), provides:

D. Rescission and Damages. For this Section 33:

(1) On rescission, a buyer shall recover (a) the consideration he paid for the security plus interest thereon at the legal rate from the date of payment by him, less (b) the amount of any income he received on the security, upon tender of the security (or a security of the same class and series).

(2) On rescission, a seller shall recover the security (or a security of the same class and series) upon tender of (a) the consideration he received for the security plus interest thereon at the legal rate from the date of receipt by him, less (b) the amount of any income the buyer received on the security.

(3) In damages, a buyer shall recover (a) the consideration he paid for the security plus interest thereon at the legal rate from the date of payment

by him, less (b) the value of the security at the time he disposed of it plus the amount of any income he received on the security.

(4) In damages, a seller shall recover (a) the value of the security at the time of sale plus the amount of any income the buyer received on the security, less (b) the consideration paid the seller for the security plus interest thereon at the legal rate from the date of payment to the seller.

(5) For a buyer suing under Section 33C, the consideration he paid shall be deemed the lesser of (a) the price he paid and (b) the price at which the security was offered to the public.[12]

(6) On rescission or as a part of damages, a buyer or a seller shall also recover costs.

(7) On rescission or as a part of damages, a buyer or seller may also recover reasonable attorney's fees

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12. Article 581-33C applies only to the liability of non-selling issuers who register securities under Section 7a, 7b or 7c of the Texas Act or under Section 6 of the Securities Act of 1933.

> if the court finds that the recovery would be equitable in the circumstances.

Tex. Rev. Civ. Stat. Ann. art. 581-33E (Vernon Supp. 1994), provides:

> E. Time of Tender. Any tender specified in Section 33D may be made at any time before entry of judgment.

Tex. Rev. Civ. Stat. Ann. art. 581-33L (Vernon Supp. 1994), provides:

> L. Waivers Void. A condition, stipulation, or provision binding a buyer or seller of a security to waive compliance with a provision of this Act or a rule or order or requirement hereunder is void.

Supreme Court, U.S.
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(3)

No. 94-379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Petitioners,

v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Respondents.

On Petition for A Writ of Certiorari
to The Court of Appeals of Texas
for the Fifth District of Texas at Dallas

REPLY BRIEF

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v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY

Respondents.

On Petition for A Writ of Certiorari to The Court of Appeals of Texas for the Fifth District of Texas at Dallas

REPLY BRIEF

Petitioners Anheuser-Busch Companies, Inc. and Campbell Taggart, Inc. submit this reply in response to arguments first raised in respondents' brief in opposition.[1]

1. Respondents do not contest the fact that the lower court ruled on the identical issue this Court will shortly decide in *Gustafson v. Alloyd Co.*, No. 93-404, *cert. granted*, 114 S.Ct. 1215 (1994): whether section 12(2) of the federal Securities Act of 1933, 15 U.S.C. § 77*l*(2), applies to the private sale of all the stock of a corporation. Nor do respondents defend, in any manner, the merits of the Texas

[1] Petitioners' Rule 29.1 listing of parents and non-wholly owned subsidiaries is contained in the Petition at p.ii.

Court of Appeals' ruling on this crucial *Gustafson* issue regarding the scope of the anti-fraud provision of the federal statute. Instead, respondents contend solely that this Court has no jurisdiction over any federal Securities Act issue due to an allegedly independent and adequate state grounds under the Texas Securities Act. *See* Opposition ("Opp.") at 4.[2]

This contention is refuted by the court of appeals' own clear language, which demonstrates that its invocation of the state securities act was by no means independent of the court's interpretation of the federal act. On the contrary, on the potentially dispositive *Gustafson* issue, the lower court treated the state securities law as wholly *dependent* on the interpretation of section 12(2) of the federal act. Contrary to respondents' suggestion (Opp. 5), the Texas court did not look to construction of section 12(2) of the federal act as a "guide" to the proper construction of the state statute. Rather, the court ruled that federal law under section 12(2) controlled, stating unequivocally that the Texas anti-fraud provision "should be applied in accordance with our interpretation of the federal statute." Petition Appendix ("Pet. App.") A28.

If this Court's *Gustafson* decision reverses the Texas court's interpretation of section 12(2) of the federal statute, the state securities ground would necessarily also fall, for it is totally dependent on the federal ruling. On the crucial issue concerning the scope of the anti-fraud provisions, the Texas court did not even cite the applicable provision of the Texas Securities Act, which is Tex. Rev. Civ. Stat. Ann. art. 581-33 A(2) (Vernon Supp. 1994) (hereinafter "section 33

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[2] Respondents do not, and cannot, challenge this Court's jurisdiction on any other grounds. Petitioners timely filed in this Court after the Texas Supreme Court denied discretionary review and rehearing (Pet. App. A1-A2). Petitioners timely sought review in the Texas Supreme Court after the Court of Appeals denied rehearing and adhered to its June 9, 1993, ruling, which is the subject of the petition. *See* Supplemental Appendix to this Reply Brief ("Supp. App.") at Supp. App. A.

A(2)"). Nor did the court of appeals cite any state precedent of any type.[3] Instead, the lower court exclusively analyzed the language of section 12(2) of the federal Securities Act, its legislative history and its interpretation by federal courts. Pet. App. A24-A28.[4]

The court remarked in passing, without any explanation or analysis, that the Texas provision "is *arguably* broader than the comparable federal language." Pet. App. A28 (emphasis supplied). If the state court had intended to rely on the Texas statute independently from federal law, it surely would have used more definitive language. In any event, section 33 A(2) of the state securities law and section 12(2) of the federal statute contain virtually identical wording. Compare Pet. 2-3 with Opp. 1a-2a. The absence of

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[3] Respondents stress (Opp. 9) that the lower court took issue with a ruling of the Texarkana court of appeals in *Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W.2d 300, 307 (Tex. App. Texarkana), *judgment set aside and cause remanded for rendition of agreed judgment*, 840 S.W.2d 384 (Tex. 1992). But the court did not refer to the Texarkana ruling when discussing the scope of the anti-fraud provisions, but only when addressing the secondary question of a buyer's right to rescission. Reference to the Texarkana ruling is of no import, in any event, because the court below based even its rescission ruling squarely on federal law. See n. 4, *infra*.

[4] The state court's treatment of the two remaining securities questions raised by the Petition was equally dependent upon its federal analysis. The federal and state anti-waiver provisions were declared to be "essentially the same," and the court for this reason was compelled to "adopt and follow" the federal precedent interpreting the federal law. Pet. App. A11-A12. Similarly, the federal and state statutes contain "virtually the same wording" regarding the award of rescission. Pet. App. A23. Although the court once referred to the various federal precedents as "reliable guides" to application of the state provision, it also characterized them as "the controlling federal cases." Pet. App. A23. Accordingly, the court determined that "the Texas provision should be applied in accordance with the federal provision." Pet. App. A24.

the phrase "prospectus or oral communication" in the Texas statute could not justify construing the state law radically differently than its federal counterpart.[5] As respondents themselves note (Opp. 11), the Texas courts have rarely even dealt with the Texas securities statute. Certainly there is no precedent interpreting the Texas anti-fraud provision as deviating in any respect from section 12(2) of the federal statute.

That the Texas and federal anti-fraud provisions are interpreted uniformly is entirely appropriate because section 33 A(2) of the Texas act was purposely patterned after section 12(2). *See* Bateman, Securities Litigation: The 1977 Modernization of Section 33 of the Texas Securities Act, 15 Hous. L. Rev. 839, 844-45 (1978). The drafters' comments accompanying amendments to the state act explain that the Texas legislature amended the state anti-fraud provision in 1977 precisely in order to "bring [it] closer to" the federal provision. Committee on Securities and Investment Banking of the Section on Corporation, Banking and Business Law of the State Bar of Texas, Comment - 1977 Amendment, *reprinted following* Tex. Rev. Civ. Stat. Ann. art 581-33 (Vernon Supp. 1994).[6] Analysis of the federal statutory

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[5] Contrary to respondents' contentions (Opp. 8 n.7), petitioners never made a public offering of stock; indeed, it has been undisputed that the sale was not subject to registration requirements under the securities laws. Talking to a few prospective buyers does not constitute a public offering. Nor did the jury find that the sale involved a "prospectus" within the meaning of the federal law, a legal question that in any event has no relevance to the applicability of the securities laws to this transaction.

[6] Respondents improperly rely (Opp. 7) on a drafters' comment concerning Article 33D of the Texas Act, regarding application to the secondary market. That comment, however, expressly applies only to suits "against non-selling issuers that register" and addresses the provision protecting such an issuer from liability for more than the public price of the registered offering. The comment simply has no application to the question here, which

scheme, in fact, wholly applies to the state scheme because other key provisions of Texas' securities laws also closely follow the federal laws. For example, section 29C of the Texas Securities Act (Tex. Rev. Civ. Stat. Ann. art. 581-29C (Vernon Supp. 1994)) contains the identical phrases of section 17(a) of the 1933 Act ("directly or indirectly" and "any device, scheme, or artifice to defraud"); as recognized in *United States v. Naftalin*, 441 U.S. 768 (1979), such language distinguishes section 17(a) from the rest of the Act. Likewise, just as the elements of section 10(b) of the 1934 Act are more stringent than those under section 12(2), so are the elements under section 27.01 of the Texas Business and Commerce Code (the Texas corollary to 10(b)) more stringent than under section 33 A(2).

The lower court thus justifiably linked the Texas anti-fraud provision with the proper interpretation of the federal Securities Act, and such linkage provides this Court with jurisdiction. Even if the state court decision was based in part on state law, the state ruling "fairly appears to rest primarily on federal law." *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). The court's treatment of the relationship between state and federal statutes demonstrates that its state law determination would have been different had the court understood the correct interpretation of federal law. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984). Where, as here, the court's state law analysis "depended entirely on its understanding of the meaning of [federal law]," there is no independent and adequate state grounds for the state court's decision. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.9 (1981). In these circumstances, the state courts "deserve to be made aware of the proper [and] significant interpretation of the intertwined federal law," which provided the sole support for the rulings under state law. *Id.*

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involves a private sale of company stock without any public offering or requirement of registration.

Particularly where, as here, this Court is about to rule in another case on the primary federal issue decided below, there would be no justification for denying review of this state court decision.[7] A ruling in favor of the *Gustafson* petitioners would eliminate the entire rationale for the ruling by the Texas Court of Appeals in this case.

2. Ignoring abundant authority that *both* parties must be returned to the *status quo ante* in order for the remedy of rescission to be applicable (*see* Pet. 21-22), respondents would have the Court create a new law of rescission. According to respondents, (Opp. 13), under the 1933 Act the only rescissory requirement is that the buyer tender the security to the seller, regardless of whether it can return the asset it bought - - namely, the company. On the contrary, the ability to tender the stock is but a threshold

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[7] Respondents baldly charge (Opp. 6, n.5) that petitioners would be bound by the prior state law rulings on any remand because they somehow failed to challenge the applicability of the state statute upon rehearing before the Texas Court of Appeals or in the application for writ of error to the Texas Supreme Court. On the contrary, however, petitioners properly addressed the scope of both the federal and state securities laws at every necessary step below. *See* Excerpt from Appellants' Brief before the Texas Court of Appeals (Supp. App. B); Excerpt from Appellants' Motion for Rehearing before the Texas Court of Appeals (Supp. App. C); and Excerpt from Appellants' Application for Writ of Error to the Texas Supreme Court (Supp. App. D). Respondents' citations merely stand for the uncontroversial proposition that litigants must specify their points of error. *See* Tex. R. App. P. 131(e); *Albright v. City of Houston*, 677 S.W.2d 487, 488 (Tex. 1984); *Sullivan v. University Interscholastic League*, 616 S.W.2d 170, 173 (Tex. 1981). Petitioners properly specified their points of error below regarding the intertwined federal and state securities issues, clearly meeting the standard of directing "the attention of the court to the error relied upon." Tex. R. App. P. 131(e). Respondents cite no authority that even suggests that petitioners' points of error before the appellate courts were deficient.

requirement for section 12(2)'s rescissory remedy.[8] Indeed, respondents have no authority for their radical departure from the well-established principles of rescission. The cases they cite (Opp. 12-16) merely treat the question of the return of an asset that is more or less valuable than it was when purchased. *None* holds that a return to the *status quo* is unnecessary.[9]

Respondents are forced to argue that the *status quo* is irrelevant because they cannot return any part of the asset they purchased, a company they placed in bankruptcy after admittedly making several ill-fated changes to the business. Under these circumstances, merely returning the paper stock in exchange for return of the entire purchase price cannot possibly be considered a fair remedy. As recognized by the courts that have held that the common law requirements for rescission apply to section 12(2) (*see* Pet. 21-22), there comes a point when rescission is no longer appropriate. Because there is nothing left of the purchased company but worthless paper stock, that point has been reached in this case.[10]

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[8] The cases cited by respondents, *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1034 (2d Cir. 1979), *Chapman v. Dunn*, 414 F.2d 153, 160 (6th Cir. 1969), and *Stadia Oil & Uranium Co. v. Wheelis*, 251 F.2d 269, 274 (10th Cir. 1957), do not hold otherwise. Each involves issues of how and when tender is to be made for purposes of section 12(2). These cases correctly hold that a tender of the stock is a prerequisite for rescission under section 12(2) but do not suggest that such a tender is the only requirement.

[9] Respondents note that in *Casella v. Webb*, 883 F.2d 805 (9th Cir. 1989) the court allowed section 12(2) rescission when the entity was bankrupt. That case, however, involved the purchase of some shares in a limited partnership, not the entire company, as in this case.

[10] The result is the same under section 33 A(2) of the Texas statute, which explicitly provides that the purchaser "may sue either at law or *in equity for rescission*," thus incorporating the common law equitable principles of rescission. Tex. Rev. Civ. Stat. Ann. art. 581-33 A(2) (Vernon Supp. 1994) (emphasis added).

3. The Texas court of appeals properly held that when the parties entered a mutual release three months after the sale, they intended for the release to cover all of the claims now at issue in this litigation. (Pet. App. A9-11). All of respondents' claims relate to alleged acts which took place before they bought the company. Under clear federal precedent, the anti-waiver provision of the 1933 Act does not nullify release of such fully mature, but unknown securities claims. *See* Pet. 23-25. Respondents are unable to overcome the sound reasoning of the Ninth Circuit in *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992), a case remarkably similar to the one at hand. What we have here is the release of fully mature claims in an arms-length transaction, where all parties are represented by counsel and have equal access to information, with the payment of substantial consideration to resolve present and future disputes and to buy peace. Contrary to respondents' contentions (Opp. 18), it makes no difference that the parties in *Petro-Ventures* were in litigation when they executed their release. In that case and ours, the parties were in a dispute, and came to an agreement. Here, as in *Petro-Ventures*, the buyers "were not so concerned with protecting their rights as investors as they were with establishing a general peace." 967 F.2d at 1342. Under these circumstances, the release of respondents' existing securities claim, whether known or unknown, is entirely valid.

Respondents inappropriately rely (Opp. 17) on a jury finding concerning when, for statute of limitations purposes, respondents *should* have known of their claims in the exercise of reasonable diligence. That question is simply irrelevant to the issue of the release. Respondents released all claims, known and unknown, and never made any factual defense that they were prevented from knowing --

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Under Texas common law, rescission is unavailable unless the *status quo* can be restored. *See DePuy v. Bodine*, 509 S.W.2d 698, 699 (Tex. Civ. App. - San Antonio 1974, writ ref'd n.r.e.).

i.e., *could* not have known -- of their existing claims. All parties and the trial court, therefore, agreed that the applicability of the release was strictly a legal question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX A

ORDER ISSUED AUGUST 2, 1993

IN THE

Court of Appeals

Fifth District of Texas at Dallas

No. 05-92-00389-CV

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC., Appellants

v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY, Appellees

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ORDER

Before Justices Baker, Chapman, and Barber

We **OVERRULE** appellees' Motion for Rehearing;

We **OVERRULE** appellants' Motion for Rehearing.

WILL BARBER
JUSTICE

SUPPLEMENTAL APPENDIX B

No. 05-29-00389-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

ANHEUSER-BUSCH COMPANIES, INC. and
CAMPBELL TAGGART, INC.,

Appellants,

v.

WILLIAM K. SNYDER, et al.,

Appellees.

On Appeal from the 160th
Judicial District Court of Dallas County

CORRECTED BRIEF FOR APPELLANTS ANHEUSER-BUSCH COMPANIES, INC., and CAMPBELL TAGGART, INC.

[EXCERPT]

POINTS OF ERROR

I. SUMMIT AND DUNNAM SNYDER RELEASED THEIR CLAIMS.

POINT OF ERROR NO. 1

The trial court erred as a matter of law in rendering judgment in favor of Dunnam Snyder and Summit because their claims are barred by a signed release supported by substantial consideration.

* * *

III. SUMMIT MAY NOT OBTAIN RESCISSION

POINT OF ERROR NO. 4

The trial court erred as a matter of law in disregarding the jury finding that the parties could not be returned to the status quo ante in awarding Summit rescissionary damages. (Jury Question Nos. 15B, 18, 19, 21, 22, 30 and 31, Tr. at 717, 724-725, 728-729, 741, 745-46).

POINT OF ERROR NO. 5

The trial court erred as a matter of law in rendering judgment against Campbell Taggart and Anheuser-Busch under § 12(2) of the Federal Securities Act of 1933 and under Art. 33A(2) of the Texas Securities Act because those statutes are inapplicable to the secondary trading stock transaction in this case.

SUPPLEMENTAL APPENDIX C

No. 05-92-00389-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

ANHEUSER-BUSCH COMPANIES, INC. and
CAMPBELL TAGGART, INC.,

Appellants,

v.

SUMMIT COFFEE COMPANY and
THE DUNNAM-SNYDER COMPANY,

Appellees.

On Appeal from the 160th
District Court of Dallas County

APPELLANTS' MOTION FOR REHEARING

[EXCERPT]

POINTS OF ERROR

POINT OF ERROR ONE

THE COURT OF APPEALS ERRED IN HOLDING THAT SUMMIT DID NOT RELEASE ITS SECURITIES CLAIMS. [Slip Op. pgs. 9-13] [Appellants' Motion pgs. 1-8]

POINT OF ERROR TWO

THE COURT OF APPEALS ERRED IN HOLDING THAT SUMMIT IS ENTITLED TO RESCISSION NOTWITHSTANDING THE JURY FINDING THAT THE PARTIES COULD NOT BE RETURNED TO THE STATUS QUO ANTE. [Slip Op. pgs. 23-27] [Appellants' Motion pgs. 8-10]

POINT OF ERROR THREE

THE COURT OF APPEALS ERRED IN HOLDING THAT § 12(2) OF THE FEDERAL SECURITIES ACT OF 1933 IS APPLICABLE TO THE SECONDARY MARKET TRANSACTION IN THIS CASE. [Slip Op. pgs. 23-27] [Appellants' Motion pgs. 11-14]

SUPPLEMENTAL APPENDIX D

No. D-4121

IN THE
SUPREME COURT OF TEXAS

ANHEUSER-BUSCH COMPANIES, INC. and
CAMPBELL TAGGART, INC.,
Respondents/Cross Petitioners,

v.

SUMMIT COFFEE COMPANY and
THE DUNNAM-SNYDER COMPANY,
Petitioners/Cross Respondents.

On Appeal from the Court of Appeals
for the Fifth District of Texas at Dallas

APPLICATION FOR WRIT OF ERROR

[EXCERPT]

I. **THE COURT OF APPEALS ERRED IN CONCLUDING THAT SUMMIT DID NOT RELEASE ITS SECURITIES CLAIMS (Point of Error 1).**

II. **THE COURT OF APPEALS ERRED IN CONCLUDING THAT SUMMIT IS ENTITLED TO RESCISSION NOTWITHSTANDING THE JURY FINDING THAT THE PARTIES CANNOT BE RETURNED TO THE STATUS QUO ANTE (Point of Error 2).**

III. **THE COURT OF APPEALS ERRED IN CONCLUDING THAT SECTION 12(2) OF THE FEDERAL SECURITIES ACT OF 1933 IS APPLICABLE TO A PRIVATE SECONDARY MARKET TRANSACTION (POINT OF ERROR 3).**

In addition to the unavailability of rescission, Summit cannot recover under section 12(2) of the 1933 Securities Act or its Texas analog because those statutes do not apply to private, secondary market transactions. The court of appeals erroneously held to the contrary. Section 12(2) applies only to initial offerings, not to after-market transactions. The Texas statute, section 33(A)(2), is likewise limited.